DOCKET

No. 08-441
Title: Jack Gross, Petitioner
v.
FBL Financial Services, Inc.
Docketed: October 6, 2008
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (07-1490/1492)
Decision Date: May 14, 2008
Rehearing Denied: July 8, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 1 2008	Petition for a writ of certiorari filed. (Response due November 5, 2008)
Nov 4 2008	Brief of respondent FBL Financial Services, Inc. in opposition filed.
Nov 5 2008	Motion for leave to file amicus brief filed by National Employment Lawyers Association.
Nov 18 2008	Reply of petitioner Jack Gross filed. (Distributed)
Nov 19 2008	DISTRIBUTED for Conference of December 5, 2008.
Dec 5 2008	Motion for leave to file amicus brief filed by National Employment Lawyers Association GRANTED.
Dec 5 2008	Petition GRANTED.
Jan 13 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Jan 14 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 26, 2009.
Jan 15 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent.
Jan 26 2009	SET FOR ARGUMENT ON Tuesday, March 31, 2009.
Jan 26 2009	Joint appendix filed. (Statement of costs filed)
Jan 26 2009	Brief of petitioner Jack Gross filed.
Jan 29 2009	CIRCULATED.
Feb 2 2009	Brief amicus curiae of United States filed. (Distributed)
Feb 2 2009	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Feb 2 2009	Brief amicus curiae of American Association for Justice filed. (Distributed)
Feb 2 2009	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed)
Feb 2 2009	Brief amicus curiae of AARP filed. (Distributed)
Feb 6 2009	Record received from the U.S.C.A. for the 8th Circuit. (1 box)
Feb 7 2009	U.S.D.C. for the Southern District of Iowa record is electronically filed.
Feb 23 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 25 2009	Brief of respondent FBL Financial Services, Inc. filed. (Distributed)
Mar 4 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Mar 4 2009	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)

Mar 4 2009	Brief amici curiae of National Federation of Independent Business Small Business Legal Center, et al. filed. (Distributed)
Mar 4 2009	Brief amicus curiae of National School Boards Association filed. (Distributed)
Mar 9 2009	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 19 2009	Reply of petitioner Jack Gross filed. (Distributed)
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PETITION FOR WRIT OF CERTIORARI

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No. 08-_____

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OFFICE OF THE CLERK

In The Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Jack Gross respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 14, 2008.

OPINIONS BELOW

The May 14, 2008 opinion of the court of appeals, is reported at 526 F.3d 356 (8th Cir. 2008), and is set out at pp. 1a-14a of the Appendix. The July 8, 2008 order of the court of appeals denying rehearing and rehearing en banc, which is not reported, is set out at pp. 49a-50a of the Appendix. The June 23, 2006 order of the district court, which is not officially reported, is set out at pp. 15a-48a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on May 14, 2008. A timely petition for rehearing en banc was denied on July 8, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), provides in pertinent part:

> It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . .

STATEMENT OF THE CASE

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court held that in a Title VII case a plaintiff is not required to present direct evidence of discrimination in order to obtain a mixed-motive instruction.[1] *Desert Palace* expressly reserved decision as to whether such direct evidence would be required in a non-Title VII case. 539 U.S. at 98; see pp. 5-10 *infra*. The instant case, arising under the Age Discrimination in Employment Act, presents that question.

Petitioner Jack Gross is an employee of respondent FBL Financial Group (FBL). Gross filed suit under the Age Discrimination in Employment Act (ADEA), alleging that he had been demoted because of his age. At trial the district judge, over defendant's

[1] In this Court's decision in *Desert Palace*, as in the lower courts, "mixed-motive instruction" refers to an instruction that if the plaintiff demonstrates that an impermissible purpose was *a* motivating factor behind a disputed decision, the burden of proof shifts to the defendant to demonstrate that it would have taken the same action even absent that impermissible purpose. 539 U.S. at 92.

objection, gave a mixed-motive instruction. Under the disputed instruction Gross was required to prove that his age was "a motivating factor" in the disputed demotion. (App. 6a). If the jury concluded Gross had met that burden, it was to return a verdict for Gross unless the defendant FBL "proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." (App. 6a).

The jury found in favor of Gross, and awarded him $46,945 in lost compensation. (App. 3a). The trial judge commented that "[d]espite the lack of . . . direct evidence of discrimination, the court believes there was ample circumstantial evidence presented during the trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age." (App. 25a). FBL appealed, contending that the trial court had erred in giving the disputed mixed-motive instruction.

The Eighth Circuit overturned the jury verdict, concluding that it was error to give that mixed-motive instruction. The court of appeals held that, except in Title VII cases covered by this Court's decision in *Desert Palace*, a mixed-motive jury instruction cannot be given unless the plaintiff offers "direct evidence" of discrimination. The court of appeals insisted that well-established Eighth Circuit precedent permits

> a shift in the burden of persuasion only upon a demonstration by direct evidence that an illegitimate factor played a substantial role in an adverse employment decision . . . Gross

> conceded that he did not present "direct evidence" of discrimination . . . , so a mixed motive instruction was not warranted.

(App. 6a-7a) (emphasis omitted). The court of appeals recognized that *Desert Palace* held that direct evidence is not required to obtain a mixed-motive instruction in a Title VII case, and acknowledged that "some of the analysis in *Desert Palace* may seem inconsistent with" the imposition of a direct evidence requirement in non-Title VII cases. (App. 11a). The Eighth Circuit reasoned, however, that in non-Title VII cases direct evidence is required under Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and that this Court's later decision in *Desert Palace* "did not speak directly to the vitality of this previous decision." (App. 11a).

The Eighth Circuit emphatically disagreed with the contrary Fifth Circuit decision in *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312-13 (5th Cir. 2004). In *Rachid* the Fifth Circuit, relying on this Court's decision in *Desert Palace*, expressly rejected any direct evidence requirement in an ADEA case. The court below noted that the Fifth Circuit in *Rachid*

> applied the analysis of *Desert Palace* to claims under the ADEA. *Rachid* held that because the relevant language in the ADEA – "because of such individual's age" – is "silent as to the heightened direct evidence standard," a plaintiff need not present "direct evidence" of discrimination to receive a mixed motives analysis for an ADEA claim.

(App. 9a-10a) (emphasis omitted). The Eighth Circuit, however, disapproved the Fifth Circuit decision in *Rachid* as "inconsistent with our circuit precedent." (App. 10a n.2). "We are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA." (App. 10a).

Gross filed a timely petition for rehearing en banc. The petition was denied on July 8, 2008.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED WAS EXPRESSLY RESERVED IN *DESERT PALACE, INC. V. COSTA*, 539 U.S. 90 (2003)

This case presents an important legal issue which has divided the lower courts since this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* held that where a plaintiff in a discrimination case makes a sufficient showing that an impermissible purpose played a role in a disputed action, the burden of proof shifts to the defendant to prove "that it would have made the same decision even if it had not allowed [the unlawful consideration] to play . . . a role [in its actions]." 490 U.S. at 244 (plurality opinion); see 490 U.S. at 261 n.5 (White, J., concurring in judgment), 261 (O'Connor, J., concurring in judgment).

The Court in *Price Waterhouse*, however, was divided over the predicate issue of when the burden of proof shifts to a defendant to prove that affirmative

defense. Justice Brennan, writing for a plurality of four Justices, would have held that the burden shifts when the plaintiff proves that an unlawful purpose played "a motivating part" in the disputed decision. 490 U.S. at 258. Justice White and Justice O'Connor, in separate concurring opinions, would have required the plaintiff to show that the impermissible motive was "a substantial factor."[2] 490 U.S. at 259 (White, J., concurring), 276 (O'Connor, J., concurring). Justice O'Connor (but not Justice White) would also have required that that showing be based on "direct evidence." 490 U.S. at 276; see *Desert Palace*, 539 U.S. at 93-94.

In the years following *Price Waterhouse*, the lower courts reached conflicting conclusions as to whether – as Justice O'Connor had suggested – direct evidence is required to shift the burden of proof to the defendant. That issue arises most frequently (as in the instant case) when a plaintiff requests a mixed-motive instruction – an instruction that the jury may find a defendant liable based on a showing that an impermissible purpose was *a* purpose of (but not necessarily the only motive behind) the disputed action. The disagreement among the lower courts regarding mixed-motive instructions has often turned on differing views as to whether Justice O'Connor's

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[2] The lower courts have generally attached no significance to the difference between "a motivating part" and "a substantial factor." That distinction was not at issue in the litigation in the instant case.

concurring opinion constituted the holding of the Court in *Price Waterhouse*.

Five years ago, in *Desert Palace, Inc. v. Costa*, this Court held that such direct evidence is not required in an employment discrimination claim brought under Title VII of the 1964 Civil Rights Act. 539 U.S. at 98-102. The Court held that it was proper to give a mixed-motive instruction[3] in that Title VII case regardless of whether or not the plaintiff had presented direct evidence of discrimination. The Court's decision, however, rested to a significant degree on certain provisions of the 1991 Civil Rights Act which apply only to Title VII. 539 U.S. at 98-102.

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[3] The mixed-motive instruction in *Desert Palace* was as follows:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

539 U.S. at 96-97.

The Court in *Desert Palace* expressly did not resolve the broader issue of whether under the earlier decision in *Price Waterhouse* direct evidence would be required to obtain a mixed-motive instruction in a non-Title VII case.[4]

> [The defendant's] argument . . . proceeds in three steps: (1) Justice O'Connor's opinion is the holding of *Price Waterhouse*; (2) Justice O'Connor's *Price Waterhouse* opinion requires direct evidence of discrimination before a mixed-motive instruction can be given; and (3) the 1991 Act does nothing to abrogate that holding. . . . [W]e see no need to address which of the opinions in *Price Waterhouse* is controlling; the third step of [the defendant's] argument is flawed, primarily because it is inconsistent with the text of [the provision of the 1991 Civil Rights Act that added 42 U.S.C. §] 2000e(m).

539 U.S. at 98.[5] As the court below noted regarding the separate opinions in *Price Waterhouse*, "[t]he Court in *Desert Palace* declined to address which opinion in *Price Waterhouse* was controlling." (App.

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[4] The parties in *Desert Palace* both briefed that issue. Brief for Petitioner, No. 02-679, at 11-17; Brief for Respondent, No. 02-679, at 21-29.

[5] Section 2000e(m) defines for purposes of Title VII the term "demonstrates." Under section 2000e(m) demonstrate means "mee[t] the burdens of production and persuasion." The Court in *Desert Palace* emphasized that this definition does not include any requirement of direct evidence. 539 U.S. at 99.

11a). The first two issues, expressly reserved in Desert Palace, are squarely presented by the instant case.

Because *Desert Palace* rested in part on reasoning that was not limited to the amendments to Title VII contained in the 1991 Civil Rights Act, that decision to some degree exacerbated the division among the lower courts regarding whether direct evidence is required in a non-Title VII case. The Court in *Desert Palace* pointed out that a direct evidence requirement would be inconsistent with the usual standard of proof in civil cases, and that there is nothing in the text of Title VII supporting a departure from that traditional standard.

> Title VII's silence with respect to the type of evidence requirement in mixed-motive cases . . . suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." [*Price Waterhouse*, 490 U.S. at 253 (plurality opinion)]. That rule requires a plaintiff to prove his case "by a preponderance of the evidence," *ibid.*, using "direct or circumstantial evidence," *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

539 U.S. at 99-100. *Desert Palace* explained that the absence of a direct evidence requirement in the language of Title VII was particularly significant because "Congress has been unequivocal when imposing heightened proof requirements in other circumstances." 539 U.S. at 99. As a number of lower courts subsequently observed, the ADEA and other federal

anti-discrimination statutes also lack any such express direct evidence requirement.[6]

This decision in *Desert Palace* increased the uncertainty as to how to treat mixed-motive claims in non-Title VII cases. "Post-*Desert Palace* it is not clear whether plaintiffs asserting claims under the ADEA can proceed under a mixed-motive theory even if they lack direct evidence of discrimination." *Snik v. Verizon Wireless*, 2004 WL 1490354 at *2 (E.D.Pa. July 1, 2004). In *Monaco v. American General Assurance Co.*, 359 F.3d 296 (3d Cir. 2004), the Third Circuit continued to treat Justice O'Connor's opinion as the authoritative articulation of the rule in *Price Waterhouse* only because "in *Desert Palace* . . . the Court declined an opportunity to indicate which opinion in *Price Waterhouse* was controlling." 359 F.3d at 300 n.5. In *Bolander v. BP Oil Co.*, 128 Fed. Appx. 412 (6th Cir. 2005), the Sixth Circuit observed "*[i]f Desert Palace* applies to age discrimination" – a possibility that court of appeals thought unclear – "a plaintiff could state a *prima facie* case by using circumstantial evidence to show that he was terminated *at least in part* due to his age." 128 Fed. Appx. at 417 (first emphasis added).

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[6] See pp. 12-15, *infra*.

II. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER DIRECT EVIDENCE IS REQUIRED TO OBTAIN A MIXED-MOTIVE INSTRUCTION IN A NON-TITLE VII CASE

Because *Desert Palace* did not announce a definitive resolution of the meaning of *Price Waterhouse*, the dispute among the lower courts about whether direct evidence is required to obtain a mixed-motive instruction in non-Title VII cases has become more entrenched. Even before *Desert Palace*, the Seventh, Ninth, Tenth and District of Columbia Circuits had already rejected such a direct evidence requirement. In the wake of *Desert Palace* the First and Fifth Circuits, which once imposed a direct evidence requirement, have now disavowed that rule. On the other hand, three other circuits, including the Eighth Circuit in the instant case, still insist that a plaintiff cannot obtain a mixed-motive instruction in a non-Title VII case without adducing direct evidence.

The Eighth Circuit direct evidence requirement rests squarely on the issue reserved in *Desert Palace* – whether Justice O'Connor's concurring opinion in *Price Waterhouse* establishes the controlling precedent.

> *Price Waterhouse* was a splintered decision. . . . We have held that Justice O'Connor's opinion concurring in the judgment is the controlling opinion that sets forth the governing rule of law. . . . According to this rule,

> to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. *Price Waterhouse*, 490 U.S. at 275 . . . (O'Connor, J., concurring in judgment).

(App. 5a). The Eighth Circuit has applied its direct evidence requirement to mixed-motive claims under 42 U.S.C. § 1981,[7] section 1983,[8] the Americans with Disabilities Act,[9] and – in the instant case – the Age Discrimination in Employment Act.

In the wake of *Desert Palace*, on the other hand, the Fifth Circuit has adopted the opposite rule, emphatically rejecting this direct evidence requirement. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004). Rather than attempt to divine which concurring opinion established the controlling law in this Court's 1989 decision in *Price Waterhouse*, the Fifth Circuit applies to the ADEA[10] the same textual

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[7] *King v. Hardest*, 517 F.3d 1049, 1056 (8th Cir. 2008) (construing *Price Waterhouse*).

[8] *King v. Hardest*, 517 F.3d at 1056.

[9] *Kiel v. Select Artifacts, Inc.*, 169 F.3d 1131, 1135-36 (8th Cir. 1999).

[10] The Fifth Circuit subsequently held that direct evidence is not required to pursue a mixed-motive claim under section 1981 or the Family and Medical Leave Act (FMLA). *Reilly v. TXU Corp.*, 271 Fed. Appx. 375, 380 (5th Cir. 2008) (section 1981); *Taylor v. Peerless Industries, Inc.*, 211 Fed. Appx. 248, 250 (5th Cir. 2006) (section 1981); *Richardson v. Monitronics Int'l*, 434 F.3d 327, 333-35 (5th Cir. 2005) (FMLA).

analysis which this Court had applied to Title VII in *Desert Palace*.

> In *Desert Palace* the Supreme Court applied the mixed-motives analysis because, "[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Desert Palace*, [539 U.S. at 98-99]. Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim.

Rachid, 376 F.3d at 311 (footnotes omitted). The particular federal statutes cited by the Fifth Circuit in *Rachid* as examples of express "heightened" requirements were the very same provisions cited for that point by this Court in *Desert Palace*.[11] *Rachid* concluded that pre-*Desert Palace* Fifth Circuit precedent,[12] which had required direct evidence to obtain a mixed-motive instruction in an ADEA case, "has been overruled by . . . *Desert Palace*." 376 F.3d at 312 n.10.

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[11] *Compare Rachid*, 376 F.3d at 311 n.9 (citing 8 U.S.C. § 1158(a)(2)(B) and 42 U.S.C. § 5851(b)(3)(D)), *with Desert Palace*, 539 U.S. at 99 (same). The parenthetical summaries of these statutes in *Rachid* are taken verbatim from the summaries of the same statutes in *Desert Palace*.

[12] *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995).

That holding is precisely the opposite of the decision below in the instant case, which adhered to the Eighth Circuit's similar pre-*Desert Palace* precedent imposing a direct evidence requirement in ADEA cases[13] because "[w]e are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA." (App. 10a).

The First Circuit, which once applied a direct evidence requirement, has now held repeatedly that *Desert Palace* precludes the imposition of a direct evidence requirement in non-Title VII cases. In evaluating the ADEA claim in *Estades v. Associates Corp. of North America*, 345 F.3d 25 (1st Cir. 2003), the court of appeals noted that

> [i]n *Desert Palace* . . . decided after the district court order in this case, the Supreme Court held that "direct evidence" is not required to prove employment discrimination in a mixed-motive case. Accordingly, we must consider both "direct evidence" . . . and circumstantial evidence.

345 F.3d at 30. The First Circuit also applies *Desert Palace* to claims under the Family and Medical Leave Act, reasoning that *Desert Palace* rejected the First Circuit's earlier direct evidence requirement.

> [Plaintiff] correctly points out that the district court followed the law in this circuit at

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[13] *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 724 (8th Cir. 2001).

> that time: the rule that usually availability of a mixed-motive analysis depended on the plaintiff's producing "direct evidence" of discrimination. *Desert Palace* overruled that rule. *See . . . Estades-Nergoni v. Assocs. Corp.*

Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 30-31 (1st Cir. 2003) (FMLA).[14]

The Ninth Circuit's en banc decision in *Desert Palace* itself rejected the direct evidence requirement, based on reasoning largely entirely applicable to the ADEA and other federal anti-discrimination statutes. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (en banc). The Ninth Circuit disapproved the very methodology followed by the Eighth Circuit in the instant case, refusing to attempt to parse which of the concurring opinions in *Price Waterhouse* stated the governing law. The efforts of the lower courts to do so, the Ninth Circuit explained, had led to a "morass." 299 F.3d at 852-54.

> Like the Supreme Court, "we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they

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[14] In *Burton v. Town of Littleton*, 426 F.3d 9, 19-20 (1st Cir. 2005), the First Circuit applied *Desert Palace* to claims arising under the ADEA as well as under Title VII. ("This Court . . . following the Supreme Court's command in *Desert Palace* . . . has rejected the requirement that there be direct evidence in mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive. *See . . . Hillstrom v. Best W. TLC Hotel. . . .*").

> were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 . . . (1993). The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn in.

299 F.3d at 854. Like the later Fifth Circuit decision in *Rachid*, the Ninth Circuit found dispositive the absence from the statutory text of any heightened standard of proof. "We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference 'direct evidence.'" 299 F.3d at 852. In the wake of its decision in *Desert Palace*, itself a Title VII case, the Ninth Circuit has repeatedly held that circumstantial evidence can be used to establish a mixed-motive claim under statutes other than Title VII.[15]

Like the Ninth Circuit, the Seventh Circuit too had rejected the direct evidence requirement even before this Court's decision in *Desert Palace*. In order to bring a case within the mixed-motive analysis in the Seventh Circuit, a plaintiff is required to adduce

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[15] *Bell v. Kaiser Foundation Hospitals*, 122 Fed. Appx. 880, 882 (9th Cir. 2004) (circumstantial evidence can be used to establish a mixed motive claim under Family and Medical Leave Act, Americans with Disabilities Act, and Title VII); *Calmat Co. v. U.S. Department of Labor*, 364 F.3d 1117, 1123 n.4 (9th Cir. 2004) ("The A[dministrative Review Board], like [the employer], erroneously stated that direct evidence of retaliation is necessary to apply the mixed-motive framework. *See Desert Palace, Inc. v. Costa* . . . ") (Surface Transportation Assistance Act).

what that circuit characterizes as "direct proof" of discrimination. The Seventh Circuit "direct proof" standard can be satisfied by circumstantial evidence, and expressly does not require direct evidence.

> [A] plaintiff "may present enough evidence to demonstrate that [the disputed adverse action] was a result of intentional discrimination." *Kennedy* [*v. Schoenberg, Fisher & Newman, Ltd.*], 140 F.3d [716], 722 [(1998)]. . . . Evidence of intentional discrimination can be either direct – "evidence that can be interpreted as an acknowledgement of discriminatory intent by the defendant," *Troupe* [*v. May Dept. Stores Co.*], 20 F.3d [734], 736 [(7th Cir. 1994)] . . . – or circumstantial – for example, ambiguous statement or suspicious timing. . . . "Once a plaintiff shows that an employment decision was motivated in part by [an illegitimate purpose], the defendant may avoid a finding of liability by proving that it would have made the same decision [even absent that discriminatory purpose.]" *Geier* [*v. Medtronic, Inc.*, 99 F.3d 238,] 241 [7th Cir. 1996]. . . . This method of proof is generally called a direct case.

Maldonado v. U.S. Bank, 186 F.3d 759, 763 (7th Cir. 1999). The Seventh Circuit has repeatedly emphasized that its "direct proof" standard does not require "direct evidence."

> [D]irect evidence "essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612,

> 616 (7th Cir. 2000). As such, because admissions are exceedingly rare in modern employment discrimination cases, "under the direct method we now also allow circumstantial evidence to be introduced." *Hottenroth v. Village of Slinger*, 388 F.3d 1015, 1028 (7th Cir. 2004).

Hossack v. Floor Covering Associates of Joliet, Inc., 492 F.3d 853, 861-62 (7th Cir. 2007).[16]

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[16] *Caskey v. Colgate-Palmolive Co.*, 535 F.3d 585, 593 (7th Cir. 2008) (FMLA and Title VII) ("[A plaintiff] can rely on two types of evidence in showing that [an unlawful purpose] motivated [the employer's] action under the direct method of proof: 'direct evidence' or 'circumstantial evidence.'"); *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 641 (7th Cir. 2008) ("The direct method of proof involves direct evidence . . . as well as more attenuated circumstantial evidence.") (ADEA claim); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) ("The nomenclature is misleading because the phrase 'direct method' tends to imply that an employee only may proceed under the direct method with 'direct evidence.' . . . [T]hat is not the case.") (Title VII and ADEA claims); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 915 n.15 (7th Cir. 2007) ("While the terms 'direct' and 'indirect' are often used without trouble, they sometimes cause confusion when litigants believe that the 'direct' method of proof permits consideration only of direct evidence – that is, testimony concerning an employer's open admission of discriminatory intent – and not circumstantial evidence."); *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007) ("'direct proof' of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion . . . , but also includes circumstantial evidence which suggests discrimination albeit through a longer chain of inferences."); *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998) (ADEA and Title VII

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The Tenth Circuit had also rejected the direct evidence requirement even prior to *Desert Palace*. In the Tenth Circuit a plaintiff could then, and can now proceed under what that circuit denotes the "direct method," by introducing "direct or substantial evidence that the alleged [impermissible] motive 'actually relate[s] to . . . the particular employment decision.'" *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999) (*quoting Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C.Cir. 1997)). Once a plaintiff establishes through the "direct method" that an impermissible purpose "played a motivating part in [the] defendant's decision," the burden shifts to the employer to show that it would have made the same decision even absent that motive. 164 F.3d at 551. This Tenth Circuit "direct method" standard clearly does not require direct evidence.

> A mixed-motive case is not established, and the *Price Waterhouse* framework does not apply, unless the plaintiff presents evidence

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claim) ("[u]nder the mixed motive approach to discrimination cases, a plaintiff may rely on either direct or circumstantial evidence to establish discriminatory intent."); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d at 722 (use of circumstantial rather than direct evidence to establish mixed-motive claim by demonstrating that unlawful purpose was a motivating factor "is more usually the case"); *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997) ("[u]nder the mixed motives approach, the plaintiff may rely upon either direct or circumstantial evidence to establish discriminatory intent."); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (same).

> that directly shows that [an impermissible purpose] played a motivating part in the employment decision at issue. We have referred to this method of establishing [unlawful discrimination] as "the direct method," see *Medlock* . . . , but we emphasize that . . . we do not require "direct" evidence "in its sense as antonym of 'circumstantial.'" *See Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171, 181 (2d Cir. 1992). . . . [T]hus a plaintiff can establish [unlawful discrimination] "directly" under *Price Waterhouse*, through the use of direct or circumstantial evidence.

Fye v. Oklahoma Corp. Comm'n, 516 F.3d 1217, 1226 (10th Cir. 2008). The Tenth Circuit applies the "direct method" to ADEA claims, noting that it can be satisfied by "direct or circumstantial evidence." *McCrary v. Aurora Public Schools*, 57 Fed. Appx. 362, 367 (10th Cir. 2003).

The District of Columbia Circuit rejected the direct evidence requirement more than a decade ago.

> [T]he defendant . . . argues that, under *Price Waterhouse*, the burden of persuasion shifts to the defendant only where the plaintiff has provided "direct" rather than "inferential" evidence of discriminatory animus. . . . We reject this contention. . . .
>
> [I]t is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent. Justice White's concurring opinion makes no mention of "direct evidence,"

> . . . nor does the plurality opinion written by Justice Brennan. . . .
>
> In our view, Justice O'Connor's invocation of "direct" evidence is not intended to disqualify circumstantial evidence. . . . Indeed, Justice O'Connor relies on circumstantial evidence in *Price Waterhouse* to show that the employer's discriminatory motive played a substantial role in the disputed employment decision.

Thomas v. National Football League Players Association, 131 F.3d 198, 203-04 (D.C. Cir. 1997).

Three circuits take the contrary view. Like the Eighth Circuit in the instant case, both the Second Circuit and the Third Circuit impose the direct evidence requirement that has been expressly rejected by six other circuits. In *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002), the Third Circuit held that "Justice O'Connor's opinion . . . represents the holding of the fragmented Court in *Price Waterhouse*," 308 F.3d at 338 n.2, and that direct evidence is thus required to establish a mixed-motive claim and shift the burden of proof to the defendant in an ADEA case. 380 F.3d at 337-38. The Third Circuit reiterated its adherence to the direct evidence requirement in *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) (ADEA), a year after this Court's decision in *Desert Palace*. The Second Circuit

also has repeatedly applied a direct evidence requirement in the years since *Desert Palace*.[17]

A number of lower courts have recognized this inter-circuit conflict. In *Ilozor v. Hampton University*, 2008 WL 2824952 (4th Cir. July 23, 2008), the Fourth Circuit noted

> We have not yet decided whether an ADEA plaintiff who lacks direct evidence of discrimination may proceed under the mixed motive approach. . . . Two Circuits have split on the question. *Compare Rachid v. Jack in the Box, Inc.* . . . with *Monaco v. American General Assurance Co.*, 359 F.3d 296, 300 (3d Cir. 2004).

2008 WL 2824952 at *5 n.7. A New Jersey state court, citing inter alia the conflict between *Rachid* and Eighth Circuit precedent,[18] observed that

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[17] *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 187 (2d Cir. 2006) ("[b]ecause [the plaintiff] presents no direct evidence of age discrimination, the court evaluates his ADEA claim under the *McDonnell Douglas* [*v. Green*, 411 U.S. 792 (1973)] framework.") (ADEA); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 71 (2d Cir. 2005) (same) (ADEA); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 173 (2d Cir. 2006) ("we agree with the District Court that [the plaintiff] failed to present any direct evidence of discriminatory animus based on his disability and therefore was not entitled to a *Price Waterhouse* burden shift.") (ADA and FMLA).

[18] *Myers v. AT&T*, 380 N.J.Super. 443, 459, 882 A.2d 961, 970 (App. Div. 2005):

> In *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004), for example, the Eighth Circuit . . . concluded

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> [s]ince *Desert Palace* was decided, the federal courts have split when confronted with the question of whether the effect of that ruling is limited to Title VII complaints or whether it is to be applied more broadly to all mixed motive discrimination cases.

Myers v. AT&T, 380 N.J.Super. 443, 459, 882 A.2d 961, 970 (App. Div. 2005). Several federal district courts have also recognized the existence of this conflict.[19]

> that the *Desert Palace* decision had "no impact on earlier Eighth Circuit decisions". . . . In *Rachid* . . . the Fifth Circuit concluded that the statutory language of the ADEA itself made clear that the heightened direct evidence standard did not apply. . . . As these examples demonstrate, there is no consensus among the federal courts respecting the scope of the *Desert Palace* decision.

[19] *Lawhead v. Ceridian Corp.*, 463 F.Supp.2d 856, 867 (N.D.Ill. 2006) ("The cases that have addressed the issue have diverged. *See Rachid v. Jack In The Box, Inc.*, . . . (extending *Desert Palace* to ADEA); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 (4th Cir. 2004) (*Desert Palace* does not apply to the ADEA)."); *Johnson v. Harvey*, 2007 WL 201225 at *1 (E.D.Ark. Jan. 24, 2007) ("In *Desert Palace* . . . the Supreme Court held that direct evidence is not necessary to prove employment discrimination in mixed motive cases under Title VII. . . . [T]he Supreme Court [has not] specifically ruled on whether the same standard applies in age discrimination cases. There is an apparent disagreement among the Circuits on the issue. Compare *Rachid v. Jack in the Box, Inc.* . . . (extending *Desert Palace* to ADEA) with *EEOC v. Warfield-Rohr Casket, Inc.* . . . (expressing doubt that *Desert Palace* would be applied to the ADEA)."); *Bequeath v. L.B. Foster Co.*, 367 F.Supp. 779, 785-86 n.4 (W.D.Pa. 2005) ("the Supreme Court in *Desert Palace*,

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III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DECIDING THE QUESTION PRESENTED

This case is an excellent vehicle for resolving the question presented. Here, as in *Desert Palace*, the case turns on the correctness of a disputed jury instruction, and thus frames a straightforward question of law unencumbered by any fact-bound controversy. The sole basis of the decision below was the Eighth Circuit's holding that direct evidence is required to obtain a mixed-motive instruction in a non-Title VII case.[20] That issue was directly addressed by both parties in the litigation below.[21]

Inc., declined the opportunity to state whether its holding in *Desert Palace, Inc.*, applied to claims in the ADEA context. . . . Consequently, the effect that *Desert Palace, Inc.* has on an analysis of discriminatory conduct continues to be a subject of debate in federal courts, with varying results."); see *Helfrich v. Lehigh Valley Hospital*, 2005 WL 1715689 at *6 n.17 (E.D.Pa. July 21, 2005) (rejecting as "singularly unhelpful" plaintiff's reliance on Fifth Circuit decision in *Rachid*, since that decision was inconsistent with controlling Third Circuit caselaw holding that direct evidence is required in an ADEA case).

[20] App. 12a ("Under our court's interpretation of *Price Waterhouse*, the final instruction in this case was not correct. Because the instruction shifted the burden of persuasion on a central issue in the case, the error cannot be deemed harmless.") The Eighth Circuit rejected a challenge by FBL to a separate jury instruction. (App. 12a-13a).

[21] Appellant's Brief, Nos. 07-1490 and 07-1492 (Eighth Cir.), at 29-35; Appellee's Brief, Nos. 07-1490 and 07-1492 (Eighth Cir.), at 33-44.

The question presented has the same practical importance for litigants as the question presented in *Desert Palace*. This Court granted review in *Desert Palace* to resolve a conflict as to whether direct evidence is required to justify a mixed-motive instruction in a Title VII case. The conflict presented in the instant case concerns whether such a direct evidence requirement should be imposed in non-Title VII cases; while the instant case arises under the Age Discrimination in Employment Act, the lower courts have consistently and correctly concluded that the same standard would apply as well to claims under the Family and Medical Leave Act, the Americans with Disabilities Act, 42 U.S.C. § 1981, the anti-retaliation provisions of the Surface Transportation Assistance Act, and other federal anti-discrimination statutes. The total number of federal claims brought under these numerous federal statutes is at least comparable to the volume of cases under Title VII alone.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 07-1490/1492

Jack Gross,	*	
	*	
Appellant/Cross-Appellee,	*	Appeals from the
v.	*	United States
	*	District Court
FBL Financial Services, Inc.,	*	for the Southern
Defendant,	*	District of Iowa.
	*	
FBL Financial Group, Inc.,	*	
	*	
Appellee/Cross-Appellant,	*	
	*	
Iowa Farm Bureau Federation;	*	
Farm Bureau Mutual Insurance	*	
Company; William Oddy,	*	
	*	
Defendants.		

Submitted: November 1, 2007

Filed: May 14, 2008
(Corrected May 14, 2008; June 3, 2008)

Before MELLOY, COLLOTON, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

FBL Financial Group (FBL) appeals a jury verdict in favor of Jack Gross, an employee who alleged that FBL violated the Age Discrimination in Employment Act (ADEA) by demoting him because of his age in 2003. FBL challenges the final jury instructions adopted by the district court, the district court's

decision to exclude certain testimony, and the court's denial of FBL's motions for judgment as a matter of law. Gross cross-appeals the district court's order denying an award of attorney's fees. Because we conclude that the jury was not instructed correctly on a material issue, we reverse and remand for a new trial.

I.

Jack Gross was born in 1948. He has worked at FBL Financial Group since 1987. He was promoted up the ranks in 1990, 1993, 1997, and 1999, arriving ultimately at the position of Claims Administration Vice President. During a company reorganization in 2001, Gross was reassigned to the position of Claims Administration Director. His job responsibilities did not change, but Gross viewed this reassignment as a demotion, because it reduced his points under the company's point system for salary grades. In 2003, FBL reassigned Gross to the position of Claims Project Coordinator. At that time, many responsibilities associated with the Claims Administration Director position were transferred to a new position, entitled Claims Administration Manager, which was assigned to Lisa Kneeskern, an employee in her early forties. Gross's new Claims Project Coordinator position had the same salary points and pay grade as Kneeskern's position, but Gross contends that the reassignment was a demotion, because Kneeskern assumed the functional equivalent of Gross's former position, and his new position was ill-defined and

lacked a job description or specifically assigned duties.

Gross brought suit in April 2004, alleging that FBL demoted him in 2003 because of his age, in violation of the ADEA. After a five-day trial, a jury found in favor of Gross, and awarded him $46,945 in lost compensation. During trial, the district court excluded testimony from FBL's vice president of claims concerning information he had received from Gross's co-workers regarding Gross's performance. The court also overruled FBL's objections to final jury instructions, including those that set forth the elements of the claim and the burdens of proof, and denied FBL's motion for judgment as a matter of law. After trial, the district court denied FBL's renewed motion for judgment as a matter of law based on sufficiency of the evidence, and FBL's motion for a new trial based on the alleged evidentiary errors. These matters give rise to the present appeal.

II.

We consider first FBL's objection to the final jury instructions concerning the elements of the claim and the burden of proof. The ADEA makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." 29 U.S.C. § 623(a). This prohibition was "derived *in haec verba* from Title VII," *Lorillard v. Pons,* 434 U.S. 575, 584 (1978), which makes it unlawful to discriminate against an individual "because of such individual's

race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

The Supreme Court, in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), addressed the burdens of proof and persuasion that apply to a plaintiff's claim that he was discriminated against "because of" an enumerated factor under Title VII. Given the similarity of language between Title VII and the ADEA, we have applied both decisions to our analysis of claims under the ADEA. *Thomas v. First Nat'l Bank of Wynne,* 111 F.3d 64, 66 (8th Cir. 1997); *see also Holley v. Sanyo Mfg., Inc.,* 771 F.2d 1161, 1164 (8th Cir. 1985) (applying *McDonnell Douglas* to an ADEA case, "[b]ecause the ADEA grew out of Title VII . . . and because much of the language of the ADEA parallels that of Title VII").

McDonnell Douglas established a burden-shifting framework for evaluating claims of discrimination. Under this framework, a plaintiff must first establish a prima facie case of discrimination, which creates a rebuttable presumption of a statutory violation, and shifts the burden of *production* to the employer. The employer must rebut this presumption by producing a legitimate, non-discriminatory reason for its actions. When it does so, the presumption disappears, and "the sole remaining issue is discrimination *vel non.*" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000) (internal quotation omitted). The burden of persuasion remains with the plaintiff throughout this analysis. *Id.*

Price Waterhouse was a splintered decision that addressed the proper approach to causation where an employer is motivated by both permissible and impermissible considerations. We have held that Justice O'Connor's opinion concurring in the judgment is the controlling opinion that sets forth the governing rule of law. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 724 (8th Cir. 2001). According to this rule, to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring in judgment). "Direct evidence" for these purposes is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas*, 111 F.3d at 66 (internal quotation and brackets omitted). It does not extend to "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment).

When a plaintiff makes the requisite showing of direct evidence, the "burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." *Id.* at 276. Under this approach, a district court

should receive all of the evidence in a case, and then determine "whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it." *Id.* at 278. If a plaintiff fails to present "direct evidence" that an illegitimate criterion played a "substantial role" in the employment decision, then the case should be decided under *McDonnell Douglas* framework, and the burden of persuasion should remain at all times with the plaintiff. *Id.* at 278-79.

The district court in this case charged the jury that Gross had the burden to prove that (1) FBL demoted Gross to Claims Project Coordinator on January 1, 2003, and (2) that Gross's age was "a motivating factor" in FBL's decision to demote Gross. Final Jury Instruction No. 11. The instruction continued that the jury's verdict must be for FBL, however, "if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." *Id.*

Under our court's application of *Price Waterhouse*, this instruction was not correct. The *Price Waterhouse* rule calls for a shift in the burden of persuasion only upon a demonstration by *direct* evidence that an illegitimate factor played a *substantial role* in an adverse employment decision. *See* 490 U.S. at 275 (O'Connor, J., concurring in judgment); *Erickson*, 271 F.3d at 724. The disputed instruction, however, provided that if Gross proved by any evidence – direct or otherwise – that age was "a motivating factor" in the employment decision, then the burden shifted to FBL to prove that its decision would

have been the same absent consideration of Gross's age.[1] Gross conceded that he did not present "direct evidence" of discrimination, (Appellant's App. 596), so a mixed motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action. *See Rockwood Bank v. Gaia,* 170 F.3d 833, 842-43 (8th Cir. 1999).

Gross contends that there was no error, because the Civil Rights Act of 1991 and the Supreme Court's decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), supersede *Price Waterhouse* and our precedents applying *Price Waterhouse* to the ADEA. Section 107 of the 1991 Act amended Title VII by adding § 2000e-2(m): "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

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[1] Our court concluded in *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 394-95 (8th Cir. 1992), that there was no material difference between the phrases "substantial role" and "motivating factor," although *Glover* was vacated on other grounds by the Supreme Court, *see* 510 U.S. 802 (1993), and our court's subsequent opinion in *Glover* did not expressly reaffirm the analysis of the previous opinion, which has no precedential value. *See Glover v. McDonnell Douglas Corp.*, 12 F.3d 845, 848 n.3 (8th Cir. 1994). It is unnecessary to consider the issue here.

origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). This section does supersede *Price Waterhouse* and its requirement of "direct evidence" in the context of Title VII claims, and it makes "motivating factor" the touchstone of the analysis for liability. To obtain a jury instruction under § 2000e-2(m), therefore, a plaintiff need only present sufficient evidence of any kind for a reasonable jury to find that one of the enumerated criteria was "a motivating factor" for an employment practice. *Desert Palace,* 539 U.S. at 101.

We conclude, however, that § 2000e-2(m) does not apply to claims arising under the ADEA. By its terms, the new section applies only to employment practices in which "race, color, religion, sex, or national origin" was a motivating factor. When Congress amended Title VII by adding § 2000e-2(m), it did not make a corresponding change to the ADEA, although it did address the ADEA elsewhere in the 1991 Act. *See Lewis v. Young Men's Christian Assoc.,* 208 F.3d 1303, 1305 & n.2 (11th Cir. 2000) (per curiam). Accordingly, the Third Circuit has held that "the Civil Rights Act of 1991 does not apply to ADEA cases," and it continues to apply the *Price Waterhouse* framework in that context. *Glanzman v. Metro. Mgmt. Corp.,* 391 F.3d 506, 512 n.3 (3d Cir. 2004). The Eleventh Circuit concluded that the 1991 Act did not supersede *Price Waterhouse* as applied to ADEA retaliation claims. *Lewis,* 208 F.3d at 1305. The Fourth Circuit has reasoned that "ADEA mixed-motive cases remain

subject to the burden-shifting rules of *Price Waterhouse*," *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.2 (4th Cir. 2004), and has suggested (without holding) that the requirement of direct evidence still applies, noting that "maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, nondiscriminatory employment decisions." *Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004). *See also Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (observing that "[w]hile the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination," and holding that "the Court's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA" insofar as the scope of disparate-impact liability is concerned); *cf. Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848, 852 (8th Cir. 2000) (holding that the 1991 Act does not apply to retaliation claims).

Gross argues nonetheless that the decision in *Desert Palace* shows that the *Price Waterhouse* analysis no longer should govern his ADEA claim. Gross relies in particular on a Fifth Circuit decision, *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312-13 (5th Cir. 2004), which applied the analysis of *Desert Palace* to claims under the ADEA. *Rachid* held that because the relevant language in the ADEA – "*because of* such individual's age" – is "silent as to the heightened direct evidence standard," a plaintiff need not present

"direct evidence" of discrimination to receive a mixed motives analysis for an ADEA claim.[2]

We are not persuaded that *Desert Palace* dictates a modification of our precedents regarding the ADEA. *Desert Palace* did hold that the *Price Waterhouse* framework is inapplicable to claims arising under Title VII and § 2000e-2(m). But the Court began its analysis by specifying that the case presented the "first opportunity to consider *the effects of the 1991 Act* on jury instructions in mixed motive cases." 539 U.S. at 98 (emphasis added). The Court then rejected the employer's argument that the 1991 Act did nothing to abrogate Justice O'Connor's opinion in *Price Waterhouse* (assuming that opinion is controlling), because the employer's contention was "inconsistent with the text of § 2000e-2m." *Id.* The Court observed that § 2000e2m requires only that the plaintiff "demonstrat[e]" that the employer used a forbidden consideration, that the 1991 Act explicitly defines the term "demonstrates," and that the text of the new statute thus left "little doubt that no special

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[2] Insofar as summary judgment is concerned, *Rachid* is inconsistent with our circuit precedent. The Fifth Circuit in *Rachid* concluded that *Desert Palace*, which involved jury instructions in a Title VII case, dictated a change in the standard for summary judgment decisions under the ADEA. Our court has held, however, that because *Desert Palace* involved jury instructions after a trial, the decision does not affect our court's analysis of motions for summary judgment under Title VII, much less under the ADEA. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

evidentiary showing" – such as "direct evidence" – is required. *Id.* at 99.

While *Desert Palace* gave weight to the fact that § 2000e-2m, on its face, "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence," *id.* at 98-99, the opinion focused on the particular text of the 1991 Act and the effects of that statute on jury instructions in mixed motive cases. When the Court previously addressed statutory text comparable to the ADEA in *Price Waterhouse* – "*because of* such individual's . . . sex," 42 U.S.C. §§ 2000e-2(a)(1), (2) (emphasis added) – the result was a fragmented decision from which our court adopted Justice O'Connor's concurring opinion as the controlling rule. The Court in *Desert Palace* declined to address which opinion in *Price Waterhouse* was controlling, 539 U.S. at 98, or to revisit *Price Waterhouse*'s interpretation of a statute, unadorned by § 2000e-2m, that prohibits discrimination "because of" an enumerated factor. Even if some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse*, the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Our cases have concluded that because *Price Waterhouse* interpreted language identical to that found in the ADEA, we should follow the *Price Waterhouse* rule in ADEA cases. *Desert Palace* does not undermine the rationale of these decisions. We thus conclude that

the *Price Waterhouse* rule continues to govern mixed motive instructions in an ADEA case.[3]

Under our court's interpretation of *Price Waterhouse*, the final instruction in this case was not correct. Because the instruction shifted the burden of persuasion on a central issue in the case, the error cannot be deemed harmless. *M.M. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 459 (8th Cir. 2008); *West Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (8th Cir. 2006). Accordingly, we reverse and remand for a new trial.

III.

We briefly address the other instructional and evidentiary issues raised by FBL, because they may recur in a new trial. *See Andrews v. Neer*, 253 F.3d 1052, 1062 (8th Cir. 2001).

FBL requested that the district court give a final instruction to the jury that included this sentence: "Defendant is entitled to make its own subjective

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[3] Even were we to accept Gross's argument that *Desert Palace* undermines the *Price Waterhouse* distinction between "direct" and other evidence for purposes of the ADEA (as opposed to Title VII), that conclusion would not necessarily support the disputed jury instruction in this case. We would be left to consider the meaning of "because of such individual's age" anew, without any distinction between direct and other evidence, but also without the "motivating factor" standard for liability set forth in § 2000e-2m, and without the corresponding partial affirmative defense of 42 U.S.C. § 2000e-5(g)(2)(B).

personnel decisions, absent intentional age discrimination, *even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority.*" The court's final instruction included only the first half of this sentence, omitting the italicized clause.

We do not think the district court's instruction on this point was an abuse of discretion. "The form and language of jury instructions are committed to the sound discretion of the district court so long as the jury is correctly instructed on the substantive issues in the case." *White v. Honeywell, Inc.*, 141 F.3d 1270, 1278 (8th Cir. 1998) (internal quotation omitted). The court's formulation allowed FBL to argue that it demoted Gross for any reason "absent intentional age discrimination." The court was not required to list examples of such reasons in a jury instruction.

FBL also appeals the district court's decision to exclude testimony from FBL's vice president of claims, Andy Lifland, about complaints that he heard from Gross's coworkers about Gross's performance in the workplace. In a post-trial order, the court agreed with FBL that our precedent allows testimony about such complaints when the employer shows that it took action on the basis of the information. *See Crimm v. Mo. Pac. R.R. Co.*, 750 F.2d 703, 709 (8th Cir. 1984). The court defended its ruling, however, on the ground that the record at trial, including FBL's offer of proof, was insufficient to establish that Lifland received and relied on the complaints. As such, the dispute now seems focused on whether FBL

laid a sufficient foundation for the presentation of Lifland's testimony, not on the legal question whether Lifland's proposed testimony would be inadmissible hearsay if there were adequate foundation for it. FBL will have a new opportunity to lay an adequate foundation in a new trial, and we do not think it would be productive to offer an opinion at this time concerning the sufficiency of the previous offer of proof.

FBL also contends that the district court should have granted judgment as a matter of law in its favor. Because we remand the case for a new trial, we need not consider whether there was sufficient evidence for a hypothetical jury, properly instructed, to return a verdict in favor of Gross. *See Dennis v. Dillard Dept. Stores, Inc.*, 207 F.3d 523, 526 (8th Cir. 2000); *Hauser v. Krupp Steel Producers, Inc.*, 761 F.2d 204, 206 n.1 (5th Cir. 1985). We also need not consider Gross's cross appeal concerning attorney's fees.

For the foregoing reasons, we reverse and remand for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JACK GROSS, Plaintiff, VS FBL FINANCIAL GROUP, INC., Defendant.	CIVIL NO. 4:04-CV-60209-TJS ORDER ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Before the court is Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial (Clerk's No. 134). Defendant requests judgment as a matter of law under Federal Rule of Civil Procedure 50, or in the alternative, a new trial under Rule 59. For the reasons that follow, the motion is denied.

I. BACKGROUND

In his complaint (Clerk's No. 1), plaintiff Jack Gross alleges FBL Financial Group, Inc. ("FBL") discriminated against him because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and the Iowa Civil Rights Act, Iowa Code Chapter 216. Specifically, Gross claims he was demoted because of his age in January 2003, when he was 54 years old.

A jury trial was held from October 31 through November 4, 2005. At the close of evidence, FBL submitted a motion for judgment as a matter of law which was denied by the court. (*See* Clerk's Nos. 117-19.) The jury returned a verdict in favor of Gross and judgment was entered against FBL for the total amount of $46,945. (*See* Clerk's Nos. 125-26.)

Under the present motion, FBL renews its motion for judgment as a matter of law and argues that the evidence was legally insufficient for any reasonable jury to have found FBL intentionally discriminated against Gross based on his age. In the alternative, FBL contends it is entitled to a new trial because the court excluded certain testimony by a witness and because the verdict, including the damage award, was against the clear weight of the evidence.

II. ANALYSIS

Federal Rule of Procedure 50(a) provides, in part, as follows:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

> maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1). If the court denies such a motion, as in this case, the movant may renew its request for judgment as a matter of law and may, alternatively, request a new trial under Rule 59. Fed. R. Civ. P. 50(b). In ruling on a renewed motion after a verdict is returned, the court may allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law. *Id.*

A. Defendant's Motion for Judgment as a Matter of Law

1. Standard for Judgment as a Matter of Law

A motion for judgment as a matter of law presents a legal question for the court: "'[W]hether there is sufficient evidence to support the jury's verdict.'" *Jones v. Swanson*, 341 F.3d 723, 731 (8th Cir. 2003) (quoting *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)). As instructed by the Supreme Court, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The court views

> the "evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility." The legal

> standard requires 1) all direct factual conflicts must be resolved in favor of the plaintiff, 2) all facts in support of the plaintiff that the evidence tended to prove must be assumed, and 3) the plaintiff must be given the benefit of all reasonable inferences. A grant of judgment as a matter of law is proper only if the evidence viewed according to this standard would not permit "reasonable jurors to differ as to the conclusions that could be drawn."

Jones, 341 F.3d at 731 (citations omitted); *see also Reeves*, 530 U.S. at 150 ("the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence"); *Spencer v. Stuart Hall Co.*, 173 F.3d 1124, 1127-28 (8th Cir. 1999) (applying standards in ADEA case).

In this age discrimination case, FBL presumes Gross established a prima facie case. (*See* Defendant's Brief in Support of Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial (Clerk's No. 140) p. 4.) At trial, FBL presented evidence of a legitimate, nondiscriminatory reason for demoting Gross. Consequently, the central issue is whether Gross presented sufficient evidence from which a reasonable jury could find that FBL's proffered explanation was a pretext for discrimination. *See Reeves*, 530 U.S. at 143 (applying *McDonnell Douglas* burden-shifting framework in ADEA case); *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 931 (8th Cir. 2000) (same). As in all discrimination cases, the

ultimate question is whether FBL intentionally discriminated against Gross. *See Reeves*, 530 U.S. at 143, 153; *Cherry v. Ritenour Sch. Dist.*, 361 F.3d 474, 478 (8th Cir. 2004) (race discrimination case); *Tatom*, 228 F.3d at 931 (age discrimination case).

2. Summary of Evidence

Following the applicable standard, the court will briefly summarize the evidence presented at trial in the light most favorable to Jack Gross. He was born on June 13, 1948. (Trial Tr. at 403.) In 1971, he began employment with Farm Bureau operations in Iowa as a multi-line claims adjuster in three southeast counties. (Tr. at 58, 403.) As described by Gross, he handled "auto collision claims, liability claims, hail claims, cattle in cornfield claims, bodily injury, medical claims, everything that basically happened in those three counties." (Tr. at 58.) After working as a regional manager for a couple of years, he voluntarily left his employment with Farm Bureau in 1978 and then returned as a claims adjuster in 1987. (Tr. at 58-59, 61-62, 403.) His supervisor was Tom Eppenauer who was a division claims manager. (Tr. at 63, 284.)

In 1990, Gross was promoted to a division claims manager in the West Des Moines claims office. (Tr. at 62.) At the time, the division claims manager was responsible for about eight to nine adjusters and a small clerical staff. (Tr. at 63.) In 1993, Gross moved to the main office and became a regional coordinator and training director. (Tr. at 65-66.) Eppenauer had

been promoted to claims vice president and remained Gross' supervisor. (Tr. at 66, 284.)

In 1994, Gross became director of claims administration. (Tr. at 66.) He had several units reporting to him and worked on a companywide project to make it as efficient as possible. (Tr. at 66-67.) In 1997, he was promoted to assistant claims manager. (Tr. at 67.)

He had several functional areas reporting to him and worked extensively on a package policy project for the company. (Tr. at 67-68.) The managers which reported to him included those for the workers' compensation, subrogation, first notice of loss, medical supervision, and physical damage departments. (Tr. 69-70.)

In January 1999, Gross was promoted to claims administration vice president. (Tr. at 71-72.) According to Gross, his job did not change much because he continued to be responsible for functional areas and continued to develop programs including the use of a debit card to pay claims. (Tr. at 72.) Throughout this time, Eppenauer remained Gross' supervisor and had recommended his promotions. (Tr. at 72, 288.) Gross had consistently received high scores on his evaluations by Eppenauer and has never been disciplined as a Farm Bureau employee. (Tr. at 77, 230.)

In August 2000, Eppenauer was demoted by the company's chief operating officer, Barbara Moore, to the position of claims training administrator and no longer had supervisory authority over Gross. (Tr. at 289.) Eppenauer described his new position as

follows: "I had supervisory authority over no one. I had virtually no duties." (Tr. at 289.) He retired in December of 2003. (Tr. at 279.)

Andy Lifland replaced Eppenauer as vice president of claims for the Iowa Farm Bureau in August 2000 and became Gross' supervisor. (Tr. at 403, 413.) Lifland had been the vice president of claims for Farm Bureau operations in Arizona and New Mexico. (Tr. at 83, 413.) Moore had also worked in the Arizona and New Mexico operations and hired Lifland for the Iowa position. (Tr. at 640, 647.)

In January 2001, Gross was demoted to the position of claims administration director as part of a reorganization of the claims department. (Tr. at 89-90.) He viewed this position as a demotion because his points under the company's Hay system for salary grades were reduced. (Tr. at 89-90.) His job responsibilities did not change. (Tr. at 90, 469-70.)

Gross received lower scores on his evaluations from Lifland than he had previously received from Eppenauer on prior evaluations. (Tr. at 110-11, 428, 432-33.) Gross believed that Lifland's evaluations were not fair because Lifland never spoke to him about his work or progress. (Tr. at 110-15.) In Gross' words, he had "never seen a worst example of a manager than Mr. Lifland." (Tr. at 106.)

On January 1, 2003, the Iowa Farm Bureau operations merged with the Kansas and Nebraska Farm Bureau operations. (Tr. at 121, 403-04.) As part of the merger, the claims department was

restructured by Lifland and Steve Wittmuss, who was from the Nebraska Farm Bureau and became the regional claims vice president and second in command below Lifland. (Tr. at 444-45, 529-30.) Wittmuss explained the restructure process as follows:

> [W]e were trying to find positions for everybody, what we thought best suited their talents. You know, when you have – when you're trying to put three companies together – you know, in a claims department, you have the support staff, you have the adjusters, and you have the district claims managers, and then you move up the ladder. And we still have the claims, so pretty much from the district claims level manager down, you know, we still needed those people and their jobs didn't change significantly.
>
> What happens is the people above that level, you have more people than you have jobs for the new organization, and so you're trying to find people to fit in – I mean, it's also a nice opportunity to go and review people and make sure you think they're where they should be.

(Tr. at 532.)

As part of the restructuring, Gross was demoted to the position of claims project coordinator. (Tr. at 403.) According to Gross, he was told in a meeting with Lifland and Wittmuss that "they decided [his] talents were better suited to this new job." (Tr. at 123.) Lifland and Wittmuss did not indicate that the

demotion was based on any problems with Gross' performance as claims administration director. (Tr. at 127.) Lifland told Gross he would be working with special projects. (Tr. at 124.) He was instructed to continue with the projects he was currently working on. (Tr. at 127-28.) Some time after the meeting, Gross received a job description for his new position as claims project coordinator. (Tr. at 124.)

As for his former claims administration director position, Gross was informed during the meeting "that they were going to create a claims administration manager and that most of [his] job would be going to Lisa Kneeskern." (Tr. at 126.) Kneeskern had been a subrogation supervisor who reported to Gross. (Tr. at 126.) At the time, Gross was 54 years old and Kneeskern was in her early forties. (Tr. at 126-27.)

On April 1, 2005, Wittmuss became Gross' immediate supervisor. (Tr. at 403.) Gross remains employed by FBL as a claims project coordinator. (Tr. at 403.)

3. Legal Analysis

FBL argues that no reasonable juror could have found that FBL intentionally discriminated against Gross based on his age. FBL asserts that Gross' reassignment in 2003 occurred because Farm Bureau operations in Kansas and Nebraska merged with the Iowa operation. According to Lifland and Wittmuss, Gross was assigned to the projects coordinator position because they believed it was the best fit for Gross' strengths. (Tr. at 123, 437-38, 532-33, 558.)

FBL's decision to reorganize its operations and reassign employees into different positions, by itself, does not violate either federal or state law. Employers are free to make their own business and personnel decisions so long as they do not involve discrimination. *See, e.g., Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 956 (8th Cir. 2001) ("'A company's exercise of its business judgment is not a proper subject for judicial oversight.'"); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) ("'[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.'"); *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) ("This court, moreover, may not second-guess an employer's personnel decisions, and we emphasize that employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully."). Accordingly, FBL presented a legitimate, nondiscriminatory reason for demoting Gross.

The jury found, however, that Gross' age was a motivating factor in FBL's decision. (*See* Final Instruction No. 11; Verdict Form.) FBL challenges the verdict by noting there was no evidence that any of Gross' superiors, including Lifland, Wittmuss and Moore, made any comments about his age. (*See* Tr. at 248-49, 441-42, 445.) All three individuals explicitly denied that age was a consideration in the decision to

place Gross in the project coordinator position. (Tr. at 412, 533, 570, 643.) Despite the lack of such direct evidence of discrimination, the court believes there was ample circumstantial evidence presented during trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age.

Gross testified that his demotion was based on his age for the following reasons:

> Well, No. 1, in Kansas everybody over 50 got bought out. They just didn't want over 50 people down there. All of the people in the Iowa operation who had been there a significant amount of time and had, you know, achieved a degree of success were getting paid well. We were all pretty much taken down at the same time, not just based on performance. The only common thread was age. And there was a merger and there was a reorganization. There's another reorganization this year, two years later, and it looks like again 55 people are going to get hurt by it.

(Tr. at 181-82.) Gross further testified: "My job was – that I had been well qualified for and handling at a very high level was taken away and given away to a much younger subordinate who had less experience and qualifications." (Tr. at 249.)

Contrary to FBL's argument, an inference of age discrimination is raised by the decision to place Kneeskern in the claims administration manager position instead of Gross. First, there was ample

evidence for the jury to find that Gross was highly qualified for the position. Gross testified that the claims administration manager position was functionally the same job he was performing before the merger. (Tr. at 129.) As stated by Gross, "some of the reporting changed, but the day-to-day real job is the same." (Tr. at 129.) Gross was never told by Lifland or Wittmuss that he was unable to perform any portion of the position. (Tr. at 135.)

Second, there was ample evidence for the jury to find that Kneeskern was not qualified for the position or, at the least, was far less qualified than Gross for the position. Gross had supervised Kneeskern for several years before the merger. (Tr. at 130-31.) During his testimony, Gross compared Kneeskern's work experience and qualifications to his and the qualifications for the claims administration manager position. (Tr. 131-34.)

In addition, Eppenauer stated explicitly that Kneeskern was not qualified for the job. (Tr. at 333, 349.) He testified that, while she was a "very good employee," her experience was limited to the subrogation department. (Tr. at 327.) As noted by Eppenauer, "[s]he did not have any field adjusting experience. She hadn't worked bodily injury claims or total loss automobile claims or work comp or any other arena of the claim department." (Tr. at 327.) In Eppenauer's opinion, Gross was much more qualified for the position than Kneeskern. (Tr. at 353-54.) In regard to Gross' job knowledge, Eppenauer testified as follows:

> It's probably as high a knowledge as we had in the department overall. There were certain areas he had extremely good insurance knowledge. There's some areas he didn't work every day which he would not have been as good as some others, but he just had superb knowledge in a number of areas.

(Tr. at 286.) When asked about Gross' interaction with the employees he supervised, Eppenauer responded, "[h]e did a great job." (Tr. at 286.)

Based on this testimony and the job descriptions admitted into evidence, the jury could have reasonably concluded that Gross was far more experienced and qualified than Kneeskern for the claims administration manager position.

An inference of discrimination is also raised by the fact that Gross was never even provided an opportunity to apply for the claims administration manager position. (*See* Tr. at 135.) As set forth above, there was sufficient evidence he had been performing the same duties for years and was far more qualified than the younger, former subordinate who was given the job. Yet, he was not provided an opportunity to apply for the position or even asked by Lifland or Wittmuss regarding the appropriateness of Kneeskern's promotion into the position. (Tr. at 134-35.) In contrast, Moore, the chief operating officer, testified that she had to reapply for her position. (Tr. at 654.)

There was also sufficient evidence for the jury to reasonably conclude that FBL's explanation for

demoting Gross was false and a pretext for discrimination. As explained by Lifland and Wittmuss, Gross was placed into the claims project coordinator position because it was a good fit for his strengths and weaknesses. Moore similarly agreed that the object was to find positions for people to fit within the new structure. (Tr. at 658.)

Wittmuss conceded, however, that at the time the decision was made the project coordinator position was ill-defined and did not have a job description or specifically assigned duties. (Tr. at 557-58.) Gross also testified that the position "was not really well defined. They said just keep on working on the projects that you're working on, which I did, but they didn't last very long." (Tr. at 167.) Consequently, the jury could have reasonably found the stated reason for Gross' demotion was not credible because there was no defined position for Gross to "fit" into. As noted by the Supreme Court, "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves*, 530 U.S. at 147.

FBL argues that uncontradicted evidence was presented which showed that Kneeskern was qualified for the claims administration manager position and that Gross was a good fit for the claims project coordinator position. FBL is correct that Gross is not entitled to " 'the benefit of unreasonable inferences, or those at war with the undisputed facts.' " *Knutson v. Ag Processing, Inc.*, 394 F.3d 1047, 1050 (8th Cir.

2005) (quoted citation omitted). Contrary to FBL's argument, however, the court does not believe the evidence supporting FBL's defenses is undisputed or uncontradicted. Instead, the jury had reasonable grounds to question the credibility of FBL's witnesses because of inconsistencies and contradictions in their testimony.

For example, Gross testified that the claims administration manager position given to Kneeskern was functionally the same job he was performing before the merger. (Tr. at 129.) Wittmuss also testified that the positions were basically the same and described them as "very similar jobs." (Tr. at 557.) Lifland, on the other hand, testified that "as it existed prior to the merger, [Gross'] position went away." (Tr. at 445.)

Lifland also testified that Kneeskern had made a complaint to him about Gross. (Tr. at 438.) Kneeskern contradicted Lifland's testimony while being cross-examined:

> Q. We've heard some discussion about concerns that you expressed to Mr. Lifland about Mr. Gross. You had a very good working relationship with Mr. Lifland; correct?
>
> A. Yes.
>
> * * *
>
> Q. You had no problems going to talk to Mr. Lifland about concerns that you had about Mr. Gross; correct?

A. I don't recall ever approaching Andy talking about any concerns about Mr. Gross.

Q. You never complained about Mr. Gross to Mr. Lifland?

A. Complained?

Q. Complained or expressed concerns or anything of that type?

A. I think that's a pretty strong word. No.

(Tr. at 582-83.)

Based on the inconsistencies and contradictions presented by FBL's own witnesses, the jury could have reasonably decided to not believe a part, or all, of their testimony including the reason given for demoting Gross. *See Reeves*, 530 U.S. at 147 ("fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'") (quoted citation omitted); *Spencer*, 173 F.3d at 1128 ("Where conflicting evidence is presented at trial, it is the jury rather than this court which assesses the credibility of the witnesses and decides which version to believe.").

An inference of age discrimination was also raised by evidence regarding the demotions of other employees in connection with the 2003 merger. (*See* Tr. at 170-73, 18182; Plaintiff Ex. 15.) Eppenauer testified that

> [a] number of senior or tenured employees with a number of significant years of service

> in at Farm Bureau were isolated and demoted. And when that is done, their pension is frozen, and essentially their ascent into the company – or into other positions in the company is frozen, and all of those individuals are near the age 50 and above. To me, that's age discrimination.

(Tr. at 365.) Although FBL argues at length about the specific circumstances of the other demoted employees, those issues can only be resolved by weighing or evaluating the evidence or considering questions of credibility. Those are matters for the jury. *Reeves*, 530 U.S. at 150 (the court "may not make credibility determinations or weigh the evidence"). Giving Gross the benefit of all reasonable inferences, however, the court finds the jury could have reasonably relied on this evidence to conclude that Gross' demotion was motivated by age.

In sum, after viewing the testimony and documents submitted in the light most favorable to Gross, this court finds sufficient evidence exists to support the jury's verdict. FBL's request for judgment as a matter of law under Rule 50 is, therefore, denied.

B. Defendant's Alternative Motion for New Trial

Federal Rule of Civil Procedure 59 provides, in part, that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues

> (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

Fed. R. Civ. P. 59(a)(1). FBL believes it is entitled to a new trial for two reasons. First, FBL asserts that the court's exclusion of certain testimony by Andy Lifland was erroneous. Second, FBL contends the jury's verdict, including the damage award, was against the clear weight of the evidence. The court disagrees on both points.

1. Exclusion of Testimony

FBL argues that the court's exclusion of evidence relating to comments coworkers made to Andy Lifland about Gross was erroneous. The court excluded certain testimony by Lifland because it was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).

The first portion of Lefland's testimony at issue states as follows:

> Q. At some point did anyone who was in your chain of command report to you that Jack Gross and Tom Eppenauer were undermining you?
>
> A. Yes.

Q. Just tell the jury about that briefly.

MS. TOWNSEND: Your Honor, I'm going to object to anything that calls for hearsay.

THE COURT: Sustained.

MR. HARTY: Your Honor, if I may, these evaluations have been called into question. I'm not offering it for the truth of the matter asserted but, rather, for the fact that Mr. Lifland, the evaluator, heard it.

THE COURT: I'll persist in my ruling.

(Tr. at 433.) Lifland later testified as follows:

Q. And, again, the 2003 decision to place Jack Gross into the project coordinator position, before that time had you received any complaints from coworkers concerning whether they really wanted to work with Mr. Gross?

A. I had, yes.

Q. . . . . Did you take that into account when you decided to assign Mr. Gross to the projects position as opposed to some position where he would be managing people?

A. I considered all of those factors, but I recognized that one of Jack's real strong points was handling projects. He was handling projects in his claims administration position as well. Jack excelled at projects. That was a real strong point. And so in our way of thinking, this claims project coordinator position

was perfect for jack, absolutely perfect. It's his strong point.

Q. At some point did you reach the conclusion that Jack Gross just didn't like you?

A. I did, yes.

Q. How did you react to that?

A. Well, I mean, I'm disappointed. It's not a popularity contest. You know, deep down, I want people to like me, but the company could do very well even if people didn't like me as long as they did the job that they were supposed to do. But, sure, I want people to like me, but apparently Jack did not.

Q. Before you actually assigned Mr. Gross to the projects position as opposed to managing people, did Lisa Kneeskern complain about him?

A. I recall her making –

MS. TOWNSEND: Your Honor, I'm going to object.

Q. (BY MR. HARTY) We're probably going to get an objection. If you would just respond whether or not you received a complaint.

A. Yes.

Q. Did you take that complaint into account when you placed Mr. Gross into the projects position in 2003?

A. Yes.

Q. Did Steve Liebbe complain about Mr. Gross?

A. Yes.

Q. Did Gregg Johnson complain about Mr. Gross?

A. Yes.

Q. Did Steve Wittmuss actually make some observations about Mr. Gross?

A. Yes.

Q. Did you take all those things into account when you made the decision to place Mr. Gross in the projects coordinator position?

A. Yes.

Q. Tell us what Mr. Liebbe said to you.

MS. TOWNSEND: Objection, hearsay.

THE COURT: Sustained.

(Tr. at 437-39.)

As reflected by the record, the testimony objected to by counsel and excluded by the court during Lifland's trial testimony was (1) the substance of the report that Gross and Eppenauer were undermining Lifland and (2) the substance of the complaint made by Liebbe. Lifland was not asked, in the presence of the jury, about the substance of complaints by Kneeskern, Johnson or Wittmuss. Although Gross' counsel objected as Lifland began answering the

question whether Kneeskern ever made a complaint, FBL's counsel proceeded before the court ruled on the objection. Because the substance of both the report and Liebbe's complaint were statements made out of court and, in the court's opinion, were offered to prove the truth of the matter asserted, the proffered testimony was properly excluded as inadmissible hearsay evidence. *See* Fed. R. Evid. 801(c); *Chadwell v. Koch Refining Co.*, 251 F.3d 727, 731 (8th Cir. 2001).

In its brief, FBL notes that federal courts have repeatedly allowed employers to present testimony concerning comments or reports that a manager took into account when making the employment decision at issue. *See Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703, 709 (8th Cir. 1984) (affirming admission of documents offered to demonstrate that employer had conducted an investigation and to disclose information that employer had relied on in making decision); *Cameron v. Community Aid For Retarded Children, Inc.*, 335 F.3d 60, 66, n. 2 (2nd Cir. 2003) (complaints by various employees against plaintiff are not hearsay because the statements are not used to prove truth of matter asserted but to establish decision-maker's state of mind); *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1349 (5th Cir. 1985) (holding transcript of appeal hearing before Board of Trustees was properly admitted for limited purpose of showing motive and intent of Board in deciding not to renew plaintiff's employment contract); *McKenna v. Weinberger*, 729 F.2d 783, 792 (D.C. Cir. 1984) (holding supervisors' testimony about complaints of

plaintiff's co-workers was not hearsay because it "was offered to illuminate their motives and actions as supervisors, not to prove that the coworkers had valid complaints").

The court recognizes and agrees with the principle set forth in those cases but does not believe the record supported its application at the time the testimony was presented. Again, the only testimony excluded was the substance of the report and Liebbe's statements to Lifland. Based on the record at the time, the court believes there was an insufficient foundation to determine that the proffered testimony was, in fact, complaints that Lifland relied upon in making decisions relevant to this case.

Later in the trial, Wittmuss was asked if he ever heard concerns from coworkers about whether they wanted Gross on their project teams, and he responded as follows:

> Well, as we went on with the – with working, you know, I had – we had regional claims managers that reported to me and we met and we tried to find sometimes projects for different people, and there was some concern about Jack working on some of the projects.

(Tr. at 535-36.) Wittmuss then identified by name five individuals who raised such concerns. (Tr. at 536.) Wittmuss was not asked, however, to discuss the substance of their concerns in any detail. No objections were made by Gross' counsel during this testimony.

Subsequently, FBL made the following offer of proof outside the presence of the jury:

> Q. Mr. Lifland, in making the decision to place Jack Gross in the project coordinator position, did you rely upon information that you had received from others in the Farm Bureau organization?
>
> A. Yes.
>
> Q. Did you take into account concerns or complaints that had been expressed to you about Mr. Gross?
>
> A. Yes.
>
> Q. Would you please tell the Court the nature of those concerns or complaints.
>
> A. There were a number of complaints. Some of them discussed the fact that Jack was – had his own agenda, had his own best interests at heart as opposed to the company's best interests; that he was not a people person, was not well-liked. Comments were made that he gave no guidance to his subordinates. There were a number of comments.
>
> Q. Did you take these comments into account in making the January 1, 2003 placement?
>
> A. Yes.
>
> Q. Were these comments made by more than one of your coworkers?

A. Yes.

Q. As we sit here today, do you know how many people made comments of that nature?

A. Directly to me, probably four, five, six.

Q. Can you identify those people, please.

A. Yes.

Q. Will you do so.

A. Steve Wittmuss, Lisa Kneeskern, Steve Liebbe, Greg Johnson, Lynn Miller, John Czerwonke.

Q. Let's start at the end. What did Mr. Czerwonke tell you?

A. Jack was not a team player. He was out for himself.

Q. How about Mr. Miller?

A. The same thing.

Q. How about Miss Kneeskern?

A. That he offered no guidance in terms of supervision.

Q. And Mr. Wittmuss?

A. Probably all of those things. And Wittmuss also heard from other individuals, so maybe – if I'm allowed to say that –

Q. If he told you –

A. Yes.

Q. – what he had heard from others and you took it into account in making that decision, yes, please explain what he told you.

A. He told me that his regional claim managers had commented directly to him that they did not want Jack on projects that they were involved in because he was very negative and brought everybody down.

Q. Let's make sure – I want to make sure that we're limiting your testimony to things that you heard before January 1, 2003, before the merger.

A. Not all of those were prior to the merger.

Q. Can you just identify for the Court which of those comments were made prior to the merger.

A. Mr. Liebbe and Miss Kneeskern, their comments about no guidance, no supervision were made prior to the merger.

Q. What about Mr. Miller or Mr. Czerwonke?

A. I would say that both of them commented prior to the merger.

MR. HARTY: Thank you. Your Honor, that is the testimony we would have offered had the Court not sustained plaintiff's counsels' objection.

(Tr. at 538-41.)

After the offer of proof, FBL did not request the court to reconsider its prior ruling or seek to have Lifland testify again. The court also notes that FBL's offer of proof did not specifically address the excluded testimony regarding the substance of the report to Lifland "that Jack Gross and Tom Eppenauer were undermining" him. Consequently, there was no evidence for the court to determine whether the substance of the report was being offered for the truth of the matter or was being offered as information relied upon by Lifland in making a personnel decision regarding Gross. Although counsel referred to evaluations in response to the objection made before the jury, Lifland himself never testified, either before the jury or during the offer of proof, as to any connection between the report and his evaluations of Gross. Without the substance, source and specifics of the report, the only conclusion the court could, and did, make was that the proffered testimony was inadmissible hearsay.

As for Liebbe's comment, Lifland again was not asked directly regarding the substance of his complaint. Instead, Lifland referred to Liebbe in response to counsel's inquiry as to which comments were made prior to the merger, stating as follows: "Mr. Liebbe and Miss Kneeskern, their comments about no guidance, no supervision were made prior to the merger." (Tr. at 540.) Consequently, even if FBL had asked the court to reconsider, there was still insufficient foundation as to the actual substance of Liebbe's comments to Lifland.

There was also insufficient foundation for the court to determine when Wittmuss may have communicated either his own concerns or those of coworkers to Lifland. Wittmuss did testify, after the offer of proof, that the concerns he had heard about Gross from coworkers were made after Gross' demotion. (Tr. at 553-54.) Consequently, those comments would not have been relied on by Lifland and are irrelevant to the decision to demote Gross.

Even if the court erred in its ruling, FBL must establish that it was prejudiced by the exclusion of the testimony. *See Keisling v. SER-Jobs for Progress, Inc.*, 19 F.3d 755, 762 (8th Cir. 1994); *cf. Paul v. Farmland Indus., Inc.*, 37 F.3d 1274, 1277 (8th Cir. 1994) ("[A] jury's verdict will not be disturbed absent a showing that the evidence was so prejudicial as to require a new trial which would be likely to produce a different result."); *Spencer*, 173 F.3d at 1130 ("We will only disturb a jury's verdict if the evidence is so prejudicial that its exclusion would likely produce a different result in a new trial.").

Based on FBL's offer of proof, the substance of the evidence FBL intended to offer was that Lifland heard comments prior to his decision from Czerwonke and Miller that Gross "was not a team player" and "was out for himself", and that he heard a complaint from Kneeskern that Gross "offered no guidance in terms of supervision." Even if FBL had offered this evidence, the court finds minimal, if any, prejudice to FBL if this limited testimony had in fact been excluded.

It is noteworthy that Lifland was allowed to testify that he did receive complaints about Gross and considered the complaints when deciding to place Gross in the projects coordinator position. Testimony was also elicited from Lifland that the complaints he received "were from coworkers concerning whether they really wanted to work with Mr. Gross." Lifland also confirmed that he heard a report "that Jack Gross and Tom Eppenauer were undermining" him. Consequently, the jury heard evidence regarding the general nature of the comments made and considered by Lifland. In the court's view, the additional testimony FBL believes it should have been able to present would have had minimal impact on the jury's decision in this case.

The court agrees with FBL's contention that the court's exercise of discretion in excluding evidence should not unfairly prevent a party from defending itself. In this case, however, FBL was not prevented from offering the evidence through other witnesses. As conceded by FBL in its brief, other witnesses could have testified about the complaints they made to Lifland. (*See* Defendant's Brief in Support of Renewed Motion for Judgment as a Matter of Law, or in the Alternative Motion for New Trial (Clerk's No. 140) at p. 34, n. 17.)

Wittmuss, Kneeskern, and Miller all testified before the jury after the offer of proof. None, however, were asked by FBL's counsel to discuss the substance of the complaints or comments referred to by Lifland. Miller was not asked any questions regarding

whether he made any complaints about Gross to Lifland. Although Wittmuss did testify that complaints were made in general terms, he was not asked to discuss the substance of the coworkers' concerns in any detail.

Kneeskern was also not asked any questions during direct examination by FBL's counsel regarding any complaints she made to Lifland. On cross examination, however, she denied making any complaints to Lifland about Gross. (Tr. at 583.) She stated: "I don't recall ever approaching Andy talking about any concerns about Mr. Gross." (Tr. at 583.) FBL's counsel did not ask any questions regarding the matter during the redirect examination.

Given the repeated opportunity FBL had in presenting the evidence through these witnesses after the offer of proof was made, the court finds no basis to conclude that FBL was unfairly prevented from presenting the evidence.

2. Weight of the Evidence

The "court may grant a new trial on the basis that the verdict is against the weight of evidence, if the first trial results in a miscarriage of justice." *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir. 1995).

> In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence – it can "weigh the evidence, disbelieve witnesses, and grant a new trial even where

> there is substantial evidence to sustain the verdict."

White, 961 F.2d at 780 (quoted citation omitted). The Eighth Circuit has noted, however, that the district court's discretion is not boundless:

> the district court is not "'free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Id. (quoted citations omitted). Ultimately, the "court must determine if there will be a miscarriage of justice if the jury's verdict is allowed to stand." *Dominium Mgmt. Servs., Inc. v. Nationwide Housing Group*, 195 F.3d 358, 366 (8th Cir. 1999).

Relying on its own reading of the documents and testimony presented at trial, the court finds that the jury's verdict is not against the weight of the evidence. Instead, the court believes there was ample evidence to justify the conclusion that FBL intentionally discriminated against Gross based on his age. Different inferences could have been drawn, but the court finds no reason to believe that the jury's verdict results in a miscarriage of justice.

3. Damage Award

FBL contends that the damages awarded by the jury is against the clear weight of the evidence. The

jury awarded Gross the amount of $20,704 for lost past salary and $26,241 for lost past stock options. (Verdict Form (Clerk's No. 125).) The jury awarded no damages for emotional distress. FBL argues that no witness presented testimony that would support a finding of $20,704 for lost past salary damages.

Gross' expert witness testified that the total loss in salary and bonus for the back pay period was "approximately $19,800." (Tr. at 384.) In closing argument, Gross' counsel referenced this specific amount. Counsel told the jury: "Mr. Ryerson testified that his lost wages were $19,800. There's really no dispute about that." (Tr. at 706.)

In his resistance, Gross asserts that the award of lost past salary was appropriate and should not be remitted. The Eighth Circuit has instructed that this "court should grant remittitur only when the award is so excessive as to shock the court's conscience." *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir. 1996) (citing *Norton v. Caremark, Inc.*, 20 F.3d 330, 340 (8th Cir. 1994)); *see also American Business Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986) ("A district court should grant remittitur only when the verdict is so grossly excessive as to shock the court's conscience.") Here, the court does not believe the damages awarded by the jury is so excessive as to meet this standard. The court also notes that FBL did not specifically request remittitur in its motion or supporting briefs. For those reasons, the court agrees that remittitur is not appropriate in this case.

The court also finds that the award of $20,704 by the jury for lost past salary is not against the clear weight of the evidence. The expert witness testified initially that Gross' lost salary is $20,704. (Tr. at 383.) The expert witness then deducted "approximately $900" based on his assumption that "the bonus and salary is all received throughout the year." (Tr. at 384.) The jury could have reasonably rejected the witness' assumption and found Gross was entitled to the full amount of $20,704.

II. CONCLUSION

As stated by the Supreme Court, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153. After reviewing all of the evidence in the record, and drawing all reasonable inferences in favor of Gross, the court concludes there was sufficient evidence for the jury to find that FBL intentionally discriminated against Gross based on his age. The court further concludes that the exclusion of certain testimony by Andy Lifland was not error or prejudicial to FBL. After relying on its own reading of the evidence, the court concludes that the jury's verdict is not against the weight of the evidence or results in a miscarriage of justice.

Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial (Clerk's No. 134) is, therefore, denied and the

judgment entered in accordance with the jury's verdict shall stand.

IT IS SO ORDERED.

Dated June 23, 2006.

/s/ Thomas J. Shields
THOMAS J. SHIELDS
CHIEF U.S.
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No: 07-1490

Jack Gross,

Appellee

v.

FBL Financial Services, INC.,

FBL Financial Group, Inc.,

Appellant

Iowa Farm Bureau Federation, et al,.

No: 07-1492

Jack Gross,

Appellant

v.

FBL Financial Services, Inc.,

FBL Financial Group, Inc.

Appellee

Iowa Farm Bureau Federation, et al.,

Appeal from U.S. District Court for the
Southern District of Iowa – Des Moines
(4:04-cv-60209-TJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 08, 2008

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

OPPOSITION BRIEF

111

No. 08-441

Supreme Court, U.S.
FILED
NOV 4 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a plaintiff must present evidence showing a link between alleged discriminatory animus and the challenged decision sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action in order to obtain a mixed-motive jury instruction at trial of an ADEA disparate treatment claim.

II. Whether the method of allocating the burden of proof regarding causation applicable to 42 U.S.C. § 2000e-2(m) of Title VII should be applied to the ADEA.

III. Whether the petitioner has failed to show a true conflict regarding the circuits' application of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to the standard for use of a mixed-motive jury instruction that would merit this Court's review.

CORPORATE DISCLOSURE STATEMENT

FBL Financial Group, Inc. does not have a parent corporation and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Jack Gross, born in 1948, began working in the claims area of the predecessor to FBL Financial Group, Inc. ("FBL") in 1987. (App. 2a). He rose through the ranks, and in 1999 was promoted to Claims Administration Vice President. (App. 2a). During a company reorganization in 2001, he was reassigned to the position of Claims Administration Director. (App. 2a). Gross's job responsibilities did not change with the reassignment. (App. 2a). Gross nevertheless considered the change a demotion because his points were reduced under the company's point system for determining salary grades. (App. 2a).

In 2003, the company eliminated Gross's position and reassigned him to a new position, Claims Project Coordinator. (App. 2a). Some responsibilities associated with his former position of Claims Administration Director were transferred to a new position, Claims Administration Manager. (App. 2a). An employee in her early forties, Lisa Kneeskern, was assigned to the new Claims Administration Manager position. (App. 2a).

Gross's new Claims Project Coordinator position had the same salary points and pay grade as Kneeskern's position. (App. 2a). Gross nevertheless contended the reassignment was a demotion because Kneeskern "assumed the functional equivalent of Gross's former position, and his new position was ill-defined and lacked a job description or specifically assigned duties." (App. 2a-3a).

Gross brought suit against FBL, alleging that in making the 2003 reassignment, the company demoted him because of his age. (App. 3a). After a five-day trial, the trial court used a mixed-motive jury instruction, charging the jury "Gross had the burden to prove that (1) FBL demoted Gross to Claims Project Coordinator on January 1, 2003, and (2) that Gross's age was a motivating factor in FBL's decision to demote Gross." (App. 6a). The trial court further charged the jury that the "verdict must be for FBL . . . if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." (App. 6a). The jury returned a verdict in favor of Gross, awarding lost compensation in the amount of $46,945, consisting of $20,704 for lost past salary and $26,241 for lost past stock options. (App. 46a) and declining to award Gross any damages for emotional distress.[1] (App. 46a). The jury found FBL's conduct was not willful.[2]

After the entry of judgment, FBL filed a Renewed Motion for Judgment as a Matter of Law or in the Alternative, Motion for New Trial. (App. 15a). FBL did not raise the issue of jury instructions in its

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[1] Gross's claims were tried under the ADEA and the Iowa Civil Rights Act, Iowa Code ch. 216 (2007). (App. 15a). Under the Iowa Civil Rights Act, a plaintiff may seek damages for emotional distress. *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 383 (Iowa 1986).

[2] *See* Docket No. 125, No. 4:04-cv-60209 (S.D. Iowa) (Jury Verdict, Nov. 4, 2005).

post-trial motion. Gross nevertheless directly quotes a statement from the trial court's ruling denying FBL's Renewed Motion for Judgment as a Matter of Law (Petition 3), in which the trial court concluded the circumstantial evidence presented at trial was adequate to establish FBL intentionally discriminated against Gross because of his age.[3] (App. 25a). The material quoted by Gross does not reflect the trial court's comments relating to the disputed mixed-motive jury instruction; indeed, the trial court analyzed FBL's Renewed Motion for Judgment as a Matter of Law using a single-motive pretext analysis, rather than a mixed-motive analysis. (App. 18a).

On appeal, FBL argued in part that the trial court had erred in giving the mixed-motive instruction.[4] The Eighth Circuit held the mixed-motive jury instruction was not correct because it shifted the

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[3] FBL raised and argued the judgment as a matter of law issue on appeal, but the Eighth Circuit declined to decide the issue. (App. 14a).

[4] Gross argued on appeal that the mixed-motive instruction was proper because he had presented "direct evidence" age was a motivating factor in the decision to assign him to the Claims Project Coordinator position. Appellee's Brief at 52, Nos. 07-1490 and 07-1492 (Eighth Circuit). He contended the "direct" evidence supporting the mixed-motive instruction was that "he was replaced by a much younger subordinate and that he was not even considered to remain in or allowed to apply for his former position." *Id.* The Eighth Circuit recognized, consistent with the evidence produced at trial, that Gross had previously acknowledged he failed to present at trial "direct" evidence of age discrimination. (App. 7a).

burden of persuasion on a central issue in the case. (App. 12a). The Eighth Circuit reversed the judgment and remanded for a new trial. (App. 12a).

The Eighth Circuit's decision was consistent with its prior holdings. The court of appeals reviewed its precedent interpreting *Price Waterhouse* and articulating the standard for a mixed-motive jury instruction

> According to this rule, to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. . . .

(App. 5a). The court of appeals explained the meaning of "direct evidence" as follows:

> "Direct evidence" for these purposes is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas*, 111 F.3d at 66 (internal quotation and brackets omitted). It does not extend to "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself."

(App. 5a). Using this "direct evidence" standard,[5] the Eighth Circuit determined the mixed-motive instruction was improper, reasoning

> The disputed instruction, however, provided that if Gross proved by any evidence – direct or otherwise – that age was "a motivating factor" in the employment decision, then the burden shifted to FBL to prove that its decision would have been the same absent consideration of Gross's age . . . Gross conceded that he did not present "direct evidence" of discrimination . . . so a mixed-motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should

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[5] The Eighth Circuit described its application of *Price Waterhouse* as follows:

> When a plaintiff makes the requisite showing of direct evidence, the "burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." . . . Under this approach, a district court should receive all of the evidence in a case, and then determine "whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it." . . . If a plaintiff fails to present "direct evidence" that an illegitimate criterion played a "substantial role" in the employment decision, then the case should be decided under *McDonnell Douglas* framework, and the burden of persuasion should remain at all times with the plaintiff.

(App. 5a-6a).

> have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.

(App. 6a-7a).

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING NEED FOR THE COURT'S GUIDANCE ON THE QUESTION PRESENTED.

The ADEA makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of*" an impermissible consideration. 29 U.S.C. § 623(a)(1) (emphasis added). This Court has repeatedly recognized that under the ADEA, to establish liability for disparate treatment, a plaintiff must establish the plaintiff's age was determinative as to the adverse employment decision at issue. *See, e.g.*, *Ky. Ret. Sys. v. EEOC*, 128 S.Ct. 2361, 2366 (2008) ("whatever the employer's decisionmaking process, a plaintiff alleging disparate treatment cannot succeed unless the employee's age actually played a role in that process and had a determinative influence on the outcome"); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (under the ADEA, "the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome'"); *Hazen Paper Co. v.*

Biggins, 507 U.S. 604, 610 (1993) (the plaintiff must prove that age "actually motivated the employer's decision").

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court interpreted 42 U.S.C. § 2000e-2(a), a Title VII provision, which prohibits discrimination in employment decisions "because of" an impermissible consideration such as gender. *Price Waterhouse* set forth a standard for analyzing causation where the evidence shows an employer was motivated by both permissible and impermissible factors. Under the *Price Waterhouse* rule, the burden of persuasion shifts to the defendant if the plaintiff produces evidence sufficient to show a link between the alleged discriminatory animus and the challenged decision "sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the decision at issue. Since *Price Waterhouse,* the courts of appeals have recognized a mixed-motive jury instruction requires the plaintiff to establish a lesser standard of causation. *See, e.g.*, *Patten v. Wal-Mart Stores E., Inc.*, 300 F.3d 21, 25 (1st Cir. 2002); *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988).

In contrast to the ADEA, 42 U.S.C. § 2000e-2(m) of Title VII states a plaintiff can establish an unlawful employment practice if he "demonstrates" an impermissible consideration "was a motivating factor

for any employment practice."[6] Gross nevertheless contends this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003),[7] which involved a straightforward application of section 2000e-2(m), presents a reason to reconsider the vitality of *Price Waterhouse*. The substantive legal issue decided by the Eighth Circuit in the decision at issue is consistent with the statutory text of the ADEA and this Court's precedent. There is no compelling reason for the Court to accept review.[8] For the reasons discussed herein, the Court should decline to consider the question presented.

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[6] Section 2000e-2(m) states: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

[7] In *Desert Palace*, 539 U.S. 90, this Court interpreted the effect of 42 U.S.C. § 2000e-2(m), an amendment to Title VII that was part of the Civil Rights Act of 1991, on jury instructions in a mixed-motive case under Title VII.

[8] The Court has previously declined to consider a similar question raised in the summary judgment context. *See Bolander v. BP Oil Co.*, 546 U.S. 926 (2005). *See* Petition for Writ of Certiorari, *Bolander v. BP Oil Co.*, No. 04-1534 (May 11, 2005), available at 2005 WL 1182273, at *21-*24. Gross cites the Sixth Circuit's decision in *Bolander v. BP Oil Co.*, 128 F. App'x 412 (6th Cir. 2005) (per curiam) (nonprecedential), in support of his argument that the Sixth Circuit has expressed uncertainty as to the question presented. Petition at 10. In *Bolander*, the court of appeals affirmed a ruling granting summary judgment in favor of the defendant. The plaintiff argued he was entitled to have the evidence reviewed under the mixed-motive test as clarified or modified by *Desert Palace*. 128 F. App'x at 417. The court

(Continued on following page)

II. THERE IS NO GENUINE CIRCUIT CONFLICT REGARDING THE ISSUE DECIDED BY THE EIGHTH CIRCUIT.

A. A Circuit Conflict Regarding the Summary Judgment Analysis Applicable to a Mixed-Motive Theory under the ADEA Is Irrelevant to the Question Presented, which Relates to Jury Instructions.

Gross attempts to create the appearance of a circuit conflict by citing numerous appellate decisions analyzing summary judgment standards.[9] Although the circuits articulate differently the framework for analyzing a non-Title VII claim proceeding under a mixed-motive theory, the variation is not relevant. The outcome would be the same on a given factual record, regardless of which method is used.

Moreover, this case does not present a question regarding the standard for evaluating a disparate treatment age discrimination claim at the summary judgment stage. The analysis a court uses to determine whether a plaintiff has generated a genuine

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declined to consider the issue because there was insufficient evidence that age was a "motivating factor" in the adverse employment decision. *Id.*

[9] The Sixth Circuit recently recognized the variety of approaches the courts of appeals have adopted since *Desert Palace* in analyzing summary judgment appeals in mixed-motive cases under Title VII and in non-Title VII cases. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 398-99 (6th Cir. 2008).

issue of material fact for trial necessarily differs from the analysis a trial court uses to determine whether a plaintiff has presented sufficient evidence at trial to support a mixed-motive instruction that shifts the burden of persuasion to the defendant. The multiple summary judgment decisions cited by Gross are simply not useful in examining the question presented, which relates to jury instructions.

The most striking example of Gross's reliance on summary judgment decisions, rather than jury instruction decisions, is his discussion of *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir. 2004), which Gross cites as a significant conflicting decision. *Rachid* is limited to the summary judgment context. *Rachid* articulated a unique "modified *McDonnell Douglas* approach" for analyzing motions for summary judgment. 376 F.3d at 312 (modifying final prong of *McDonnell Douglas* analysis to permit plaintiff to establish a genuine issue of material fact by offering evidence to show either the defendant's proffered explanation is a pretext for discrimination, or evidence "that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic"). *See also Reilly v. TXU Corp.*, 271 F. App'x 375, 380 (5th Cir. 2008) (nonprecedential) (applying *Rachid*'s modified *McDonnell Douglas* analysis where the plaintiff failed to bring forward direct evidence of discrimination).

Gross accurately states the Eighth Circuit discounted the Fifth Circuit's decision in *Rachid* as

inconsistent with Eighth Circuit precedent. Yet Gross conspicuously omits discussion of the Eighth Circuit's reasoning. The Eighth Circuit recognized *Rachid* involved an appeal of a ruling granting summary judgment, and for that reason, determined *Rachid* was inconsistent with the Eighth Circuit's summary judgment precedent, stating

> Insofar as summary judgment is concerned, *Rachid* is inconsistent with our circuit precedent. The Fifth Circuit in *Rachid* concluded that *Desert Palace*, which involved jury instructions in a Title VII case, dictated a change in the standard for summary judgment decisions under the ADEA. Our court has held, however, that because *Desert Palace* involved jury instructions after a trial, the decision does not affect our court's analysis of motions for summary judgment under Title VII, much less under the ADEA.

(App. 10a).[10]

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[10] The Eighth Circuit has repeatedly taken the position that *Desert Palace* had no impact on a summary judgment analysis. *See Carraher v. Target Corp.*, 503 F.3d 714, 716 n.3 (8th Cir. 2007); *Simpson v. Des Moines Water Works*, 425 F.3d 538, 542 n.4 (8th Cir. 2005); *Johnson v. AT&T Corp.*, 422 F.3d 756, 760-61 n.4 (8th Cir. 2005); *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). The Eighth Circuit's standard regarding the analysis applicable to a mixed-motive claim at summary judgment is not the same as the Eighth Circuit's standard regarding the evidence a plaintiff must present to justify a mixed-motive jury instruction at trial of an ADEA claim.

In the summary judgment context, the Eighth Circuit has held, consistent with many circuits, that a plaintiff may support a mixed-motive claim with circumstantial evidence. The Eighth Circuit has recognized that its use of the term "direct" evidence in the mixed-motive context does not refer to evidentiary law terminology, stating, "'direct' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence." *Griffith*, 387 F.3d at 736. *See also Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007). Indeed, if Gross had attempted to rely on the Eighth Circuit's decisions articulating the standard for analyzing a motion for summary judgment in a mixed-motive disparate treatment case (which he has done with the other circuits), he would have to concede the Eighth Circuit recognizes both direct and circumstantial evidence generate a genuine issue of material fact for trial.

Additionally, the summary judgment appeal decisions Gross cites from other circuits do not provide compelling support for his argument that there is a circuit split regarding the evidence a plaintiff must produce at trial of a non-Title VII disparate treatment claim in order to justify a mixed-motive jury instruction.

The First Circuit's post-*Desert Palace* standard for analyzing mixed-motive claims at summary judgment is inconsistent and apparently unsettled. One summary judgment appeal decision cited by Gross, *Estades-Negroni v. Associates Corp. of North America*, 345 F.3d 25 (1st Cir. 2003), was withdrawn

for panel rehearing in a March 25, 2004 order. *Estades-Negroni v. Assocs. Corp. of N. Am.*, 362 F.3d 874 (1st Cir. 2004). The First Circuit's decision on panel rehearing omitted discussion of *Desert Palace* and did not address the evidence a plaintiff must produce at trial of an ADEA claim to justify a mixed-motive instruction. *Estades-Negroni v. Assocs. Corp. of N. Am.*, 377 F.3d 58 (1st Cir. 2004). In *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003), also involving an appeal of a summary judgment ruling, the court of appeals cited the first *Estades-Negroni* decision before that decision was withdrawn for panel rehearing. Whether *Hillstrom* represents precedential authority on this issue in the First Circuit is therefore not clear. Furthermore, in a more recent First Circuit decision, *Rios-Jimenez v. Principi*, 520 F.3d 31, 39 (1st Cir. 2008), the court of appeals returned to its pre-*Desert Palace* standard for analyzing a mixed-motive theory at summary judgment, stating

> A mixed-motive analysis is appropriate where direct evidence exists that an employer, in making an adverse employment decision, considered a proscribed factor, e.g. race or disability, as well as one or more legitimate factors, e.g., competence or performance.

At summary judgment, the Second Circuit requires a plaintiff pursuing a mixed-motive theory to proffer evidence of conduct or statements that reflect directly the alleged discriminatory intent and bear

directly on the contested employment decision. *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 173 (2d Cir. 2006). In *Sista*, a summary judgment decision, the Second Circuit discussed in dictum the evidence a plaintiff must produce at trial to receive a mixed-motive jury instruction, stating

> Evidence potentially warranting a *Price Waterhouse* burden shift includes, inter alia, policy documents and evidence of statements or actions by decisionmakers that may be viewed as directly reflecting the alleged discriminatory attitude.

Sista, 445 F.3d at 173 (citations and internal quotation marks omitted).

To survive summary judgment, the Third Circuit requires a plaintiff pursuing a mixed-motive theory to present "direct" evidence of discrimination. "Direct" evidence is defined as

> To be "direct" for purposes of the *Price Waterhouse* test, evidence must be sufficient to allow the jury to find that the decision makers placed a substantial negative reliance on the plaintiff's age in reaching their decision. . . . That means [the plaintiff] must produce evidence of discriminatory attitudes about age that were causally related to the decision to fire her.

Glanzman v. Metro. Mgmt. Corp., 391 F.3d 506, 512 (3d Cir. 2004).

The Fourth Circuit has determined that at summary judgment, courts should evaluate a mixed-motive theory under the *Price Waterhouse* standard. *See Baqir v. Principi*, 434 F.3d 733, 744, 745, n.13 (4th Cir. 2006); *see also EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163-64 (4th Cir. 2004). A plaintiff pursuing a mixed-motive theory under the ADEA may survive summary judgment by producing "at most, evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Baqir*, 434 F.3d at 744 (quoting *Warfield-Rohr Casket Co.*, 364 F.3d at 163).

In the Sixth Circuit, a plaintiff asserting a mixed-motive theory under the ADEA may survive summary judgment by presenting "direct evidence" the employer considered an impermissible factor in making the challenged decision.[11] *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 2003) (en banc). The Sixth Circuit defines "direct" evidence

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[11] The Sixth Circuit recently articulated how a summary judgment motion should be analyzed when the plaintiff asserts a theory under section 2000e-2(m) of Title VII. *White*, 533 F.3d at 398-99. Under the standard, a plaintiff should survive summary judgment if the plaintiff produces evidence that (1) the defendant took an adverse employment action against the plaintiff, and (2) a factor prohibited by Title VII was a motivating factor for the adverse action. *Id.* at 400. The court of appeals stated its holding was limited to claims under section 2000e-2(m) and the analysis was inapplicable to Title VII claims proceeding under the "because of" theory associated with 42 U.S.C. § 2000e-2(a)(1). *Id.* at 400 n.10.

in this context as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* at 570. Relevant factors include, "whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination." *Allen v. Highlands Hosp. Corp.*, ___ F.3d ___, 2008 WL 4629518, at *5 (6th Cir. Oct. 21, 2008) (citing *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994)).

In performing a summary judgment analysis, the Seventh Circuit distinguishes between the "direct" and "indirect" methods of proof. *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999). "The focus of the direct method of proof thus is . . . whether the evidence 'points directly' to a discriminatory reason for the employer's action." *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008). This analysis does not appear to be used at trial in determining proper jury instructions. *See Boyd v. Ill. State Police*, 384 F.3d 888, 895 (7th Cir. 2004).

The Ninth Circuit has not expressly decided the proper analysis for an ADEA claim under a mixed-motive theory at the summary judgment stage. In *Sellie v. Boeing Co.*, 253 F. App'x 626, 627 n.2 (9th Cir. 2007) (nonprecedential), a decision affirming the grant of summary judgment, the Ninth Circuit

recognized the issue is unresolved ("For purposes of this appeal, we assume (without deciding) that *Desert Palace* and the 1991 amendments to Title VII are applicable to the ADEA.").

The well-established legal standards for analyzing whether a plaintiff has generated a genuine issue of material fact for trial regarding a mixed-motive theory of discrimination in a non-Title VII case present no conflict of consequence.

B. Speculation Regarding the Impact of *Desert Palace* Has Largely Faded.

Gross cites a number of federal district court and state court decisions that express uncertainty as to the impact of *Desert Palace* on non-Title VII claims, or discuss a purported circuit split regarding whether *Desert Palace* is applicable to the ADEA. Petition at 22-23. The "uncertainty" expressed by a handful of lower courts regarding the impact of *Desert Palace* appears to have been stimulated in large part by the considerable attention academicians gave to *Desert Palace*, opining the decision had a sweeping impact.[12]

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[12] *See, e.g.*, Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 Fla. St. U. L. Rev. 859, 861 (2004); T.L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 S. Tex. L. Rev. 137 (2004); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 Emory L.J. 1887 (2004); William R. Corbett,

(Continued on following page)

Such insecurity has faded since the opinion was first issued in 2003. Left to their own devices, courts have been capable of resolving the question Gross contends was generated by *Desert Palace*. *See, e.g.*, *Inman v. Klockner Pentaplast of Am., Inc.*, 2008 WL 3193431 (W.D. Va. Aug. 6, 2008); *Benko v. Portage Area Sch. Dist.*, 2006 WL 1698317 (W.D. Pa. June 19, 2006). The courts of appeals are certainly well-equipped to decide the question when squarely presented, to the extent any question lingers.

C. There Is No Circuit Conflict Regarding the Use of a Mixed-Motive Jury Instruction at Trial of a Non-Title VII Discrimination Claim.

Gross cites only a handful of cases that decide the evidence a plaintiff must present at trial of an ADEA (or any other non-Title VII) claim to justify shifting the burden of persuasion to the defendant by using a mixed-motive jury instruction. Ultimately, there is no significant conflict among the circuits regarding the standard for using a mixed-motive jury

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McDonnell Douglas, 1972-2003: May You Rest in Peace?, 6 U. Pa. J. Lab. & Emp. L. 199 (2003); Jeffrey A. Van Detta, *Le Roi Est Mort; Vive Le Roi!: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case*, 52 Drake L. Rev. 71, 76 (2003). Some even reasoned *Desert Palace* established the end of the longstanding *McDonnell Douglas* burden shifting analysis often used by courts in the summary judgment context.

instruction under the ADEA or any other non-Title VII case. The outcome would be the same in any circuit on a given factual record.

Gross characterizes the Eighth Circuit's decision as requiring a heightened direct evidence standard, predicated on a distinction between direct and circumstantial evidence. Evidentiary law has defined "direct" evidence as "evidence which, if believed, proves the fact in issue without the aid of an inference." 1A Wigmore, Evidence § 25 (Tillers rev. 1983) (citing *Privette v. Faulkner*, 550 P.2d 404, 406 (Nev. 1976)).

The standard articulated by the Eighth Circuit is broader than the evidentiary law standard. The Eighth Circuit decision defined "direct evidence" as evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. (App. 5a). As used by the Eighth Circuit and other courts of appeals,[13] "direct evidence" is not the same as the evidentiary law term.[14]

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[13] It is notable that in *Costa v. Desert Palace*, 299 F.3d 838, 853 (9th Cir. 2002), the Ninth Circuit relied on and adopted a standard articulated by the Eighth Circuit.

[14] The term "circumstantial" is not once used in the challenged Eighth Circuit decision. (App. 3a-12a).

It is not clear how the Fifth Circuit will apply *Rachid* to jury instructions, if at all. However, *Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005), a case involving a Title VII retaliation claim, suggests the Fifth Circuit may apply the same analysis as the Eighth Circuit. In *Septimus*, the Fifth Circuit held erroneous a district court's use of a "motivating factor" jury instruction instead of a "but for" jury instruction because the plaintiff did not present "direct" evidence of retaliatory intent. 399 F.3d at 607-08. The Fifth Circuit determined the trial court committed plain error by charging the jury with mixed-motive jury instruction instead of the "but for" standard of causation, and reversed and remanded the case for a new trial. *Id.* In *Septimus*, as in the instant case, the trial court recognized the case was a pretext case rather than a mixed-motive case. (App. 18a-19a, 24a-25a). 399 F.3d at 607-08.

The Tenth Circuit has stated that the jury should be charged with a mixed-motive instruction if a plaintiff demonstrates through the production of direct or circumstantial evidence the alleged unlawful motive "actually relates to the question of discrimination in the particular employment decision." *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (citation, quotation marks and emphasis omitted). The Tenth Circuit has qualified the circumstantial evidence aspect of this standard, however, to effectively establish the same standard applied by the Eighth Circuit and others, stating

> Although circumstantial evidence is sufficient to establish that the employer was motivated by retaliatory animus, that circumstantial evidence must be tied "directly" to the retaliatory motive. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997) ("A plaintiff will be entitled to the burden-shifting analysis set out in *Price Waterhouse* upon presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged [retaliatory] attitude.")

Fye, 516 F.3d at 1226.

To support a mixed-motive jury instruction, the D.C. Circuit requires a plaintiff to present evidence of conduct or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision. *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997). *Thomas* clarified that such evidence may be direct or circumstantial in nature. 131 F.3d at 204. Yet this standard is effectively the same standard articulated by the Eighth Circuit in the challenged decision (stating "'[d]irect evidence'" for these purposes is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action"). (App. 5a).

Gross offers no other circuit decisions analyzing the evidence a plaintiff must produce to support use of a mixed-motive jury instruction. Given Gross's inability to establish a circuit conflict, there is no compelling reason for the Court to accept review.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ALLEGED CONFLICT.

A. A Decision by This Court Would Have No Practical Significance.

A decision by this Court would have no practical impact on the outcome of this case. Regardless of outcome, the Eighth Circuit will likely remand the case and order a new trial. If the Court were to accept review and ultimately reverse the Eighth Circuit, the case would by no means be concluded. The Eighth Circuit would need to determine whether the mixed-motive jury instruction was supported by the evidence at trial. Indeed, the Eighth Circuit recognized this issue would need to be resolved, stating, "Even were we to accept Gross's argument that *Desert Palace* undermines the *Price Waterhouse* distinction between 'direct' and other evidence for purposes of the ADEA (as opposed to Title VII), that conclusion would not necessarily support the disputed jury instruction in this case." (App. 12a).

B. There Are Other Legal Grounds for Reversing the Trial Court.

The Eighth Circuit's decision left open the question of whether the trial court should have denied FBL's Renewed Motion for Judgment as a Matter of Law. The court of appeals declined to decide the issue in favor of remanding the case to the trial court to conduct a new trial, using the proper jury instruction, stating

> Because we remand the case for a new trial, we need not consider whether there was sufficient evidence for a hypothetical jury, properly instructed, to return a verdict in favor of Gross.

(App. 14a). Given the question left open by the Eighth Circuit, a decision by this Court reversing the court of appeals would not resolve the case. In fact, if the Eighth Circuit were to hold the trial court should have granted FBL's Renewed Motion for Judgment as a Matter of Law, the case could very well be finished with the entry of judgment against Gross.

C. The Court Should Wait for a More Suitable Vehicle for Deciding the Question Presented.

Even if the question presented merits review, the Court should wait for a case that is a more suitable vehicle, where the failure to use a mixed-motive jury instruction prejudiced the plaintiff. In the instant case, there is no question that Gross failed to produce

at trial any evidence that FBL's decision was motivated by age. Any discussion as to the evidence a plaintiff must produce to support using a mixed-motive jury instruction is therefore entirely academic.

IV. THE EIGHTH CIRCUIT WAS CORRECT AND APPLIED A STANDARD CONSISTENT WITH THIS COURT'S PRECEDENT.

The decision below is correct regardless of how the Court would resolve the question presented. Gross was not entitled to a mixed-motive jury instruction because he failed to present evidence at trial to support a finding by a reasonable fact finder that age actually motivated FBL's decision.

Gross's suggestion that the Court grant review on the question presented and ultimately hold that a plaintiff should not be required to present "direct evidence" would leave courts without any standard for evaluating whether a plaintiff has presented evidence sufficient to support a mixed-motive instruction. The standard articulated by the courts of appeals requires nothing more than some evidence an illegitimate criterion actually motivated the decision.

The Eighth Circuit's decision was legally correct and entirely consistent with this Court's precedent.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Honorable Court deny the Petition for a Writ of Certiorari filed by Petitioner Jack Gross.

Respectfully submitted,

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REPLY BRIEF

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Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING WHAT TYPE OF EVIDENCE IS SUFFICIENT TO SHIFT THE BURDEN OF PROOF IN A MIXED MOTIVE CASE

A. WHETHER DIRECT EVIDENCE IS NEEDED TO SHIFT THE BURDEN OF PROOF DOES NOT DEPEND ON WHETHER THE ISSUE ARISES AT SUMMARY JUDGMENT OR AT TRIAL

The Eighth Circuit in the instant case held that the standard adopted in *Desert Palace v. Costa*, 539 U.S. 90 (2003), does not apply to ADEA claims, and that a shift in the burden of proof (and a burden shifting jury instruction) requires direct evidence of discrimination. In *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305 (5th Cir.2004), the Fifth Circuit reached the opposite conclusion, holding that the *Desert Palace* standard does apply to ADEA claims, and that direct evidence is not required to shift the burden of proof.[1] The Second and Third Circuits endorse a direct evidence requirement in non-Title VII cases; several other circuits reject any such requirement. (Pet.14-22).

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[1] The decision in *Rachid* is not called into question by the subsequent decision in *Septimus v. University of Houston*, 399 F.3d 601 (5th Cir.2005). *Septimus* was a Title VII case, not an ADEA case, and thus clearly was controlled by *Desert Palace*. The issue in *Septimus* was not what evidence is needed to shift the burden of proof in a mixed motive case. "The parties agree that this case was litigated and tried as a 'pretext' (rather than 'mixed-motive') retaliation case." 399 F.3d at 607.

Respondent insists that the decisions (and conflict) outside the Eighth Circuit are generally irrelevant to the question presented because most of those cases concern whether direct evidence is required at summary judgment, whereas the instant case concerns whether direct evidence is required at trial. (Br.Opp.9-17). But respondent does not explain why, or even argue that, the standard at summary judgment and at trial *should* be any different. At both stages the question is the same: is a plaintiff required to meet some sort of "heightened standard" to shift the burden of proof to the defendant. See *Desert Palace*, 539 U.S. at 101. The standards to be utilized at trial are equally applicable at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Respondent suggests that in an ADEA case the Eighth Circuit standard for assessing burden shifting at summary judgment is "not the same" as the Eighth Circuit standard for deciding whether a burden-shifting instruction should be given in such a case. (Br.Opp.11n.10). But respondent nowhere explains what the differences are between those assertedly distinct Eighth Circuit standards. In the court of appeals respondent took the contrary position, maintaining that the *same* standard applies at summary judgment and in determining whether to give a burden-shifting instruction. In arguing below that a burden-shifting instruction is never permissible if a plaintiff relies on circumstantial evidence, respondent

relied on two Eighth Circuit summary judgment decisions.[2]

This Court does not recognize any such distinction between the summary judgment and trial standard. In *Desert Palace* this Court described the inter-circuit conflict that prompted the grant of review in that case.

> [A] number of courts have held that direct evidence is required to establish liability under [Title VII]. See, *e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (C.A.8 2002); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.2d 572, 580 (C.A.1 1999); *Trotter v. Board of Trustees of Univ. of Ala.*, 91 F.3d 1449, 1453-54 (C.A.11 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (C.A.4 1995). In the decision below, however, the Ninth Circuit concluded otherwise.

539 U.S. at 95. The Ninth Circuit decision in *Desert Palace* concerned the standard for giving a burden-shifting instruction; among the conflicting decisions, cited without distinction in this regard, *Fernandes* and *Trotter* were summary judgment decisions, *Trotter* concerned a motion for judgment as a matter of law, and only *Mohr* was a dispute about jury instructions.

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[2] Appellant's Brief, p. 32 (citing *E.W. Blanch Co., Inc. v. Enan*, 124 F.3d 965, 970 (8th Cir.1997); *Thomas v. First Nat'l Bank of Wayne*, 111 F.3d 64, 65-66 (8th Cir.1997)).

The court below also drew no distinction between the standard applicable at summary judgment and the standard governing jury instructions. The panel held that the giving of the disputed burden-shifting instruction in this case was error "[u]nder our court's application of *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]." (App.6a). The two earlier Eighth Circuit decisions cited as setting "our precedents regarding the ADEA" (App.10a) were both summary judgment cases. (App.5a).[3] To buttress its decision that direct evidence is required, even after *Desert Palace*, to warrant a burden-shifting instruction in an ADEA case, the court below cited three post-*Desert Palace* decisions in other circuits; all were summary judgment cases.[4] (App.8a-9a).[5]

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[3] The cited cases were *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (8th Cir.1997) and *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718 (8th Cir.2001).

[4] The cited cases were *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506 (3d Cir.2004), *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160 (4th Cir.2004), and *Mereish v. Walker*, 359 F.3d 330 (4th Cir.2004).

[5] Respondent suggests the court below did not follow the holding in *Rachid* only because that Fifth Circuit decision concerned the evidence required to warrant a mixed motive analysis at summary judgment. (Br.Opp.11). The footnote on which respondent relies, however, merely asserts that the Eighth Circuit precedent conflicts with *Rachid* regarding the impact of *Desert Palace* on summary judgment motions in Title VII cases. (App.10a n.2).

The panel refused to accept the reasoning of *Rachid* in the instant case because it disagreed with the Fifth Circuit's analysis of the significance of *Desert Palace* for ADEA cases.

(Continued on following page)

B. THE VARIOUS STANDARDS APPLIED BY THE COURTS OF APPEALS ARE SUBSTANTIVELY DIFFERENT

(1) For nineteen years since this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the lower courts in hundreds of cases have struggled with the issue of whether a plaintiff must adduce direct evidence of discrimination in order to shift the burden of proof to a defendant.[6] Two circuits thought the issue was of such significance as to warrant consideration en banc.[7] In *Desert Palace* this Court granted certiorari to resolve a conflict as to whether or not direct evidence is required in a Title VII mixed motive case. Because of the importance of the issue in *Desert Palace*, the United States participated in this Court, and a range of amici filed briefs insisting (from different points of view) that whether or not there would be a direct evidence requirement would be of considerable significance to the enforcement of Title VII.

> *Rachid*...applied the analysis of *Desert Palace* to claims under the ADEA....We are not persuaded that *Desert Palace* dictates modifications of our precedents regarding the ADEA.

(App.9a-10a).

[6] A Westlaw search for federal decisions containing both a reference to *Price Waterhouse* and the phrase "direct evidence" enumerates 2000 opinions.

[7] *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir.2003)(en banc); *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir.2002)(en banc).

The circuits today remain divided regarding whether to require direct evidence in a non-Title VII case, as they were prior to *Desert Palace* regarding Title VII. But, respondent insists, that disagreement simply does not matter, because the standard actually used by circuits requiring direct evidence, and by circuits rejecting that requirement, are "effectively the same." (Br.Opp.21). This supposed consensus imposes no restrictions at all on how a plaintiff can seek to show that an impermissible consideration was a motivating factor and thus shift the burden of proof to the defendant. "The standard articulated by the courts of appeals requires nothing more than some evidence an illegitimate criterion actually motivated the decision." (Br.Opp.24).

Respondent does not contend that the Eighth Circuit's assertedly undemanding direct evidence rule, or this supposed nationwide consensus, arose only after the 2003 decision in *Desert Palace*; to the contrary, the direct evidence formula applied by the court below was taken from a 1997 Eighth Circuit opinion[8] and from Justice O'Connor's 1989 opinion in *Price Waterhouse*. (App.5a). If respondent is correct, then there never was any meaningful disagreement among the lower courts, even regarding Title VII cases; the last nineteen years of litigation did not matter at all, and this Court's decision to grant

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[8] App.5a (*quoting Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64 (8th Cir.1997)).

certiorari in *Desert Palace* was a mistake. In *Desert Palace* this Court held that "no heightened showing is required" to support a mixed motive claim under Title VII. Respondent suggests that this Court's decision was quite unnecessary, because the lower courts never required more than "some evidence" to support such a claim.

Respondent's account of the law is not merely wrong, it is a straightforward reversal of the position it took in the court of appeals. In the court below respondent argued that under controlling Eighth Circuit precedent a plaintiff cannot rely on circumstantial evidence to shift the burden of proof to a defendant (see p. 8, *infra*), a rule that assuredly is not "effectively the same" as the evidentiary standard in other courts of appeals.

(2) It emphatically is not the case that the Eighth Circuit "require[s] nothing more than some evidence an illegitimate criterion" was a motivating factor. (Br.Opp.24). To the contrary, the court of appeals spelled out a series of types of evidence which a plaintiff is not permitted to use to make such a showing. For example, a plaintiff cannot rely on "statements by decisionmakers unrelated to the decisional process itself." (App.5a)(*quoting* Justice O'Connor's concurring opinion in *Price Waterhouse*). Evidence that the decisionmaker had announced that he disliked minority, female, Muslim or older workers would not support a mixed motive instruction unless the statement was made as part of the very personnel process which led to the adverse action complained of.

This Court has expressly held that such biased remarks are indeed probative of discrimination even if not "made in the direct context" of the assertedly discriminatory decision. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152-53 (2000). In holding that the very evidence that would support a finding of discrimination in *Reeves* cannot be relied on to meet the Eighth Circuit direct evidence requirement, that circuit is obviously requiring just the sort of "heightened showing" disapproved (for Title VII cases) in *Desert Palace*.

In this Court respondent asserts that the Eighth Circuit direct evidence standard can be satisfied by circumstantial evidence. (Br.Opp.12). But in the court below, respondent took precisely the opposite position, insisting that under Eighth Circuit precedent circumstantial evidence is insufficient.

> The framework for evaluating an age discrimination claim is dependent [on] whether the type of evidence presented in support of the claim is direct or circumstantial....Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law. *E.W. Blanch, Inc. v. Enan*, 124 F.3d 965, 970 (8th Cir.1997); *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 65-66 (8th Cir.1997).

Appellant's Brief, pp. 30, 32.

The disposition of this case in the court below turned on the Eighth Circuit's view that the "direct evidence" standard is indeed a stringent one. During

the post-trial motions, counsel for plaintiff summarized the evidence as follows:

> [W]e don't have anything in this case that says we've got to get rid of Gross because of his age or we've got to demote Gross because of his age or Jack [Gross] is old and over the hill and give that position to [the younger worker], it isn't there.
>
> But *if that's what direct evidence is*, then we don't need it, and there's plenty of this record that's circumstantial to support the conclusion and the inference that age was a basis, age was a motivating factor....

(Appellant's App.596)(emphasis added). The court of appeals held that this concession that plaintiff had only circumstantial evidence meant that the Eighth Circuit's direct evidence standard was not satisfied. "Gross conceded that he did not present 'direct evidence' of discrimination, (Appellant's App.596), so a mixed motive instruction was not warranted." (App.7a). The manner in which the court of appeals applied the Eighth Circuit's direct evidence standard to the instant case makes crystal clear that the court of appeals regarded that standard as requiring far more than just "some evidence" of discrimination.

The Second Circuit also requires more than "some evidence." Both before and after *Desert Palace*, the Second Circuit has held that "to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory

treatment." *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 173 (2d Cir.2006)(quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir.1997)). The most Second Circuit decision holds that only a "smoking gun" will suffice.[9] "Direct evidence of discrimination, 'a smoking gun,' is typically unavailable." *Holcomb v. Iona College*, 521 F.3d 130, 140 (2d Cir.2008). Among the types of evidence deemed insufficient to meet the Second Circuit's "smoking gun" standard are statistical evidence of discrimination in favor of white workers and proof that a minority plaintiff was disciplined for conduct "that White employees engaged in with impunity." *Fields v. New York State Office of Mental Retardation*, 115 F.3d 116, 124 (2d Cir.1997). That is precisely the type of evidence that can ordinarily be relied on to prove discrimination. *Reeves* 530 U.S. at 133 (unequal discipline); *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973)(statistical evidence).

(3) Such stringent restrictions are absent in the circuits which have rejected the direct evidence requirement.

The Fifth Circuit decision in *Rachid* contains no limitations whatever on the types of evidence that might be used to prove that an unlawful consideration was a motivating factor. It held that "the

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[9] *Beauchat v. Mineta*, 257 Fed.Appx. 463, 463 (2d Cir.2007)(plaintiff's evidence was "not the type of direct evidence or 'smoking gun' needed to establish gender or race discrimination via *Price-Waterhouse* mixed-motive analysis.").

mixed-motives analysis used in Title VII cases post-*Desert Palace* is equally applicable [to the] ADEA." 376 F.3d at 312. *Desert Palace*, of course, disapproves of requiring any "heightened showing" to shift the burden of proof. 539 U.S. at 101. *Rachid* expressly relied on age-related remarks that were not made "in the direct context of the [disputed] termination," the very evidence which the Eighth Circuit will not consider. 376 F.3d at 315 (*quoting Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1506-07 (5th Cir.1988)). In *Rachid* the Fifth Circuit applied no special test in evaluating the sufficiency of the plaintiff's evidence; it denied summary judgment because "a rational finder of fact could conclude that age played a role in [the employer's] decision to terminate Rachid." 376 F.3d at 315-16. In the instant case, on the other hand, the Eighth Circuit expressly did not reach that question (App.14a), because it held that a mixed motive claim must meet that circuit's more stringent direct evidence requirement.

Respondent asserts that the District of Columbia Circuit

> requires a plaintiff to present evidence or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision. *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir.1997).

(Br.Opp.21). No such "directness" requirements are to be found anywhere in the decision in *Thomas*. What the D.C. Circuit actually held was that

> the burden of persuasion shifts to the defendant when the plaintiff has shown by a preponderance of "*any* sufficiently probative direct *or indirect* evidence" that unlawful discrimination was a substantial factor in the employment decision.

131 F.3d at 203 (emphasis added)(*quoting White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir.1991)).

Respondent suggests that the Seventh Circuit requires a heightened showing similar to the Eighth Circuit rule, quoting a passage from *Atanus v. Perry*, 520 F.3d 622, 671 (7th Cir.2008), which states that "[t]he focus of the [Seventh Circuit] direct method of proof this is...whether the evidence 'points directly' to a discriminatory reason for the employer's action." (Br.Opp.16). *Atanus* cannot plausibly read as holding that the Seventh Circuit's so-called "direct method" requires a plaintiff to meet a heightened evidentiary standard; both *Atanus* and the decision from which the phrase "points directly" is there quoted[10] are post-*Desert Palace* Title VII cases. The very next sentence in *Atanus*, moreover, makes clear that all traditional circumstantial evidence (not only, as the Eighth Circuit requires, evidence "specific[ally] link[ed]" to the particular disputed decision) is entirely sufficient. 520 F.3d at 672.

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[10] *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 751 n.3 (7th Cir.2006).

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The decision below turned directly and solely on the issue of whether a plaintiff must have direct evidence of discrimination in order to shift the burden of proof to a defendant and to obtain a burden-shifting jury instruction. Whatever the exact contours of the Eighth Circuit's direct evidence requirement, it clearly is just the sort of heightened showing requirement that this Court disapproved for Title VII cases in *Desert Palace*.

Respondent contends that, even if the jury instruction were proper, it would still prevail on remand on the ground that there was insufficient evidence to support the jury's finding that age was indeed a motivating factor in Gross's demotion. (Br.Opp.22-24). The District Judge who tried this case concluded the evidence entirely sufficient. (App.18a-31a). Respondent would of course be free to pursue this argument on remand. But the possibility that a respondent may ultimately prevail on some distinct issue, as yet unresolved by the circuit court, is not a basis for denying review of the question of law that actually was decided by the court of appeals.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

111 (3) No. 08-441

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IN THE

Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to U.S. Supreme Court Rule 37.2(b), the **National Employment Lawyers Association** moves this Court for leave to file a brief *amicus curiae* in support of Petitioner. Petitioner Jack Gross, through counsel, gave his consent. Respondent FBL Financial Services, Inc., after timely notice to its counsel of the intention of *amicus curiae* to file this brief, indicated that it would not consent.

REASONS FOR GRANTING THE MOTION

NELA members represent thousands of individuals in this country who have suffered unlawful employment discrimination, including age discrimination. (See fuller description at pages 1-2 of the attached brief under "Statement of Interest of *Amicus Curiae*.") NELA is thus uniquely positioned to explain the importance of the issues at bar. NELA's brief will assist the Court in determining whether to grant *certiorari* because it explains the full scope of the issues presented by the petition. Specifically, the brief explains that the question presented here has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule as a prerequisite to obtaining a so-called "mixed-motive" instruction in cases arising across the entire federal statutory landscape, not only under the Age Discrimination in Employment Act, but also under the Family and Medical Leave Act, the Americans with Disabilities Act, and 42 U.S.C. § 1981, as well as under the retaliation provisions of Title VII. But the brief argues further that the Court's resolution of the question presented here will not merely settle lingering questions about lower courts' use of the direct evidence rule. It should also help to clarify an

important corollary question: in the absence of a direct evidence rule, what proof framework (or standard of causation) should courts apply to discrimination cases?

For these reasons, *amicus* respectfully requests that the Court accept and file the attached brief *amicus curiae* in support of Petitioner.

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who represent employees who have suffered from employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts regarding the proper interpretation and application of the Age Discrimination in Employment Act and other anti-discrimination statutes, to ensure that the goals of those statutes are fully realized. Some of the more recent cases before the U.S. Supreme Court in which NELA has filed *amicus curiae* briefs include *Crawford v. Metropolitan Gov't of*

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. Both parties have been given at least 10 days notice of *amicus*'s intention to file.

Nashville & Davidson County (No. 06-1595); *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Kentucky River Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008). NELA also filed an *amicus curiae* brief in *Desert Palace v. Costa*, 539 U.S. 90 (2003), the case at the heart of the underlying action here.

SUMMARY OF THE ARGUMENT OF *AMICUS CURIAE*

Petitioner has asked the Court to resolve the question explicitly reserved in *Desert Palace v. Costa*, 539 U.S. 90 (2003), namely, whether plaintiffs must continue to "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case." Pet. for Writ of Cert. at i. The answer to that question (over which the circuit courts are conflicted) has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule in discrimination cases arising across the entire federal statutory landscape.

Amicus curiae the National Employment Lawyers Association (NELA) joins Petitioner in urging the Court to grant *certiorari*, not only to answer this important question regarding the direct evidence rule, but also to answer an important related question: if courts in non-Title VII cases should not continue to use the direct evidence rule to select which standard of causation to apply, how *should* they determine which standard of causation applies?

This brief argues that in the absence of a direct evidence rule, courts face a choice among possible causation standards. Under one possible approach, which might be termed "the uniform approach," courts would use ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute, and then apply that causation standard to every case that arises under that statute. Under another possible approach, which might be termed "the split approach," courts would divide every case that came before them into one of two categories, labeled "single motive" and "mixed motive," based on the court's interpretation of the evidence submitted or on the plaintiff's theory of the case. That categorization would then determine the causation standard to be applied.

Lower courts have been uncertain how to determine the appropriate standard of causation since the Court's decision in *Desert Palace*, and many commentators have described the caselaw as being in "disarray." Courts have historically relied on the "direct evidence" distinction to decide which framework to apply. After *Desert Palace*, most courts have continued to employ a variant of the "split approach," but often use strained and conflicting reasoning to get there – suggesting that in the absence of the direct evidence rule, courts lack an adequate basis on which to determine which proof framework or causation standard to apply. This uncertainty underscores the need for greater clarity in the wake of *Desert Palace*.

As a result, *amicus curiae* NELA, on behalf of its members who litigate these cases every day, and the courts that must decide them, respectfully asks this

Court to grant *certiorari* in this case and resolve the lingering questions regarding the direct evidence rule, while also providing as much guidance as possible on the proper causation standard for discrimination cases, going forward.

ARGUMENT

I. Petitioner Asks the Court to Answer an Important Question Left Unresolved in *Desert Palace v. Costa*, 539 U.S. 90 (2003): Whether Courts in Non-Title VII Discrimination Cases Should Continue to Use the Direct Evidence Rule to Select Between Two Distinct Proof Frameworks

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), this Court was asked to decide whether "direct evidence is . . . required in Title VII cases to trigger the application of the 'mixed motive' analysis set out in *Price Waterhouse v. Hopkins*." Br. for Pet'r, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 742558 at *i. Petitioner now asks the Court to resolve a closely related question, namely, whether, given the Court's reasoning in *Desert Palace*, plaintiffs must continue to "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a *non*-Title VII case." Pet. for Writ of Cert. at i (emphasis added).

Both questions make use of a familiar shorthand. As the Eighth Circuit explained in the decision below, courts in discrimination cases have generally applied one of two proof frameworks, arising under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See Gross*

v. FBL Fin. Servs., Inc., 526 F.3d 356, 359-60 (8th Cir. 2008). Courts have decided which of these two frameworks to apply according to the type of evidence submitted by the plaintiff: if the plaintiff submits "direct evidence" (defined by the Eighth Circuit in *Gross* as evidence "showing a specific link between the alleged discriminatory animus and the challenged decision"), then the *Price Waterhouse* or "mixed motive" framework will apply; otherwise, the *McDonnell Douglas* framework will apply. *See Gross* at 359.

While descriptions of the two frameworks vary, courts have assumed that the *Price Waterhouse* framework imposes a lower standard of causation, under which plaintiffs can prove that illegal discrimination occurred if they prove that the protected characteristic was at least "a motivating factor" for the adverse action. *Gross* at 360. The *McDonnell Douglas* framework has been understood by many courts to impose a higher standard of causation, requiring plaintiffs to prove that the discriminatory motive was a "but for" or "determining" cause of the adverse action, *see, e.g.*, *Gross* at 360, or even the sole cause of the adverse action, *see, e.g.*, *Ginger v. District of Columbia*, 527 F.3d 1340, 1345 (D.C. Cir. 2008).

Thus, the question presented in the instant case might also be phrased, "Should courts in non-Title VII cases continue to use the direct evidence rule to select between the *McDonnell Douglas* and *Price Waterhouse* proof frameworks?" or, more succinctly, "Should courts in non-Title VII cases continue to use the direct evidence rule to select which standard of causation to apply?"

As Petitioner has explained, the Court in *Desert Palace* reserved this question, and the circuit courts are conflicted over it. Some courts, like the Eighth Circuit below, have concluded that the Court's rejection of the direct evidence rule in *Desert Palace* was limited to cases brought under 42 U.S.C. § 2000e(m), a statutory provision added to Title VII by the 1991 Civil Rights Act which expressly mentions the "a motivating factor" causation standard (and contains no mention of a direct evidence requirement). Pet. for Writ of Cert. at 8, 11-12. Other courts have concluded that the reasoning in *Desert Palace* applies more generally, barring any use of the direct evidence rule because the rule is inconsistent with the usual standard of proof in both civil and criminal cases. Pet. for Writ or Cert at 12-15; *see also Desert Palace*, 539 U.S. at 100 (noting that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted").[2]

The question presented here has great importance for discrimination law, since it affects courts' continued use of the direct evidence rule in discrimination cases

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2. Although the Court did not elaborate on this point in the short *Desert Palace* opinion, its rejection of the direct evidence rule was presumably based, not just on the arbitrariness of any distinction between direct and circumstantial evidence, but also on the arbitrariness of any link between the type of evidence produced (direct or circumstantial) and the number of motives alleged. *See Griffith v. City of Des Moines*, 387 F.3d 733, 742-44 (8th Cir. 2004) (Magnuson, J., concurring) (labeling this link "capricious" and noting, "[t]here is no rational connection between the type of evidence presented by a plaintiff and whether a case involves single or mixed-motives").

arising across the entire federal statutory landscape, not only under the Age Discrimination in Employment Act, but also under the Family and Medical Leave Act, the Americans with Disabilities Act, and 42 U.S.C. § 1981, as well as under the retaliation provisions of Title VII. Pet. for Writ of Cert. at 25. But the Court's resolution of the question presented here will not merely settle lingering questions about lower courts' use of the direct evidence rule. As explained further below, it should also help to clarify an important related question: in the absence of a direct evidence rule, what proof framework (or standard of causation) should courts apply to discrimination cases?

II. The Court's Decision in this Case Will Have Even Broader Implications for Discrimination Law than the Question Presented Might Suggest, Since the Court's Rejection of the Direct Evidence Rule Calls into Question the Continued Existence of Two Distinct Proof Frameworks

Lower courts have been using the direct evidence rule to select between two proof frameworks, arising under *McDonnell Douglas* or *Price Waterhouse*, which have been understood to impose different standards of causation. *Desert Palace* made clear that this was a mistake: at least in Title VII cases, courts are barred from using the direct evidence rule to choose between the frameworks. Petitioner now asks this Court to grant *certiorari* in order to extend the logic of that holding, to bar courts from using the direct evidence rule to analyze discrimination claims under any federal statute. But this begs another question, one which *Desert Palace* also left unresolved: if courts should not use the direct evidence rule to choose between proof frameworks, how should they decide which proof framework to apply?

A. In the Absence of a Direct Evidence Rule, Courts Face A Choice

In traditional terms, the choice faced by courts would be defined by the contrasting labels "*McDonnell Douglas* framework" and "*Price Waterhouse* framework." However, the former term is ambiguous, since courts nominally operating under this framework have actually applied different standards of causation. *Compare Gross*, 526 F.3d at 360 (imposing but for standard) *with Ginger*, 527 F.3d at 1345 (imposing sole cause standard). Moreover, it is not clear, in light of subsequent caselaw, whether it is correct to say that *McDonnell Douglas* created a "proof framework" that conflicts with the framework in *Price Waterhouse*.[3] Given

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3. *McDonnell Douglas* is usually cited as the source of a "burden-shifting framework" for proof of discrimination. *See, e.g.*, *Gross*, 526 F.3d at 359. But the label is anachronistic. Prior to this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), some lower courts read *McDonnell Douglas* to impose a type of burden shift, by requiring an employer to identify the non-discriminatory reason or reasons for its action, and granting judgment to the plaintiff as a matter of law if he or she could disprove the reason(s) provided by the employer. *See Hicks* at 508-09. In the language of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), some courts read *McDonnell Douglas* to "progressively . . . sharpen the inquiry into the elusive factual question of discrimination." *Burdine* at 256 n.8. But *Hicks* held that this was an over-reading of *McDonnell Douglas*: the plaintiff's disproof of the proffered reason(s) creates only a permissible inference, not a mandatory presumption of discrimination. *Hicks* at 511. Thus, ever since *Hicks*, it has arguably been inaccurate to say that *McDonnell Douglas* is a "burden-shifting framework" or even that it is a

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this, it is clearer to refer to the choice facing courts, post-*Desert Palace*, as a choice between possible causation standards.

Under one possible approach, which might be termed "the uniform approach," courts would use ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute, and then apply that causation standard to every case that arises under that statute. *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 Emory L.J. 1887 (2004) (arguing for "a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard

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proof framework at all. *McDonnell Douglas* merely reinforces a truism regarding the possible inference one could draw from the plaintiff's disproof of the employer's proffered reason(s). The *McDonnell Douglas* opinion actually has nothing to say regarding the proper standard of causation in discrimination cases (indeed, one could say that *Price Waterhouse* was decided exactly because *McDonnell Douglas* and its progeny had left the causation issue open.)

One caveat: it remains true, even after *Hicks*, that *McDonnell Douglas* imposes a burden shift, if the employer remains mute in the face of plaintiff's prima facie case. In that instance, the prima facie case alone would allow judgment for the plaintiff. But this is merely a theoretical possibility; in actuality, defendant employers who remain mute (that is, who do not claim to have had *some* non-discriminatory reason for their actions) are rare to the point of non-existence.

to differentiated rules regarding proof structures"). Under the uniform approach, for example, courts might determine, based on the policy expressed in the 1991 Civil Rights Act, that plaintiffs in Title VII cases should be able to prove that illegal discrimination occurred by proving that a protected characteristic such as race was a motivating factor in the employer's decision to take an adverse action. Courts might determine that other statutes, such as the Age Discrimination in Employment Act, also impose the "a motivating factor" standard, or, alternatively, they might determine, based on their differing language and legislative history, that other federal statutes impose a different causation standard, such as the "but for" standard.

Under another possible approach, which might be termed "the split approach," courts would divide every case that came before them into one of two categories, labeled "single motive" and "mixed motive," based on the court's interpretation of the evidence submitted. Cases labeled "single motive" would, by necessity, make use of a "sole cause" causation standard (since, under the assumption that the employer only had one motive, either a non-discriminatory motive was the sole cause of the adverse action or a discriminatory motive was the sole cause of the adverse action). Cases labeled "mixed motive" would be subject to either the "a motivating factor" causation standard or the higher "but for" standard, depending on the court's reading of the pertinent statute. A variation of the split approach would make the causation standard ("a motivating factor," "but for factor" or "sole cause") dependent on the plaintiff's theory of the case rather than the court's interpretation of the evidence.

B. The Court and the Litigants in *Desert Palace* Recognized that the Elimination of the Direct Evidence Rule Created Uncertainty About the Correct Proof Framework to Apply to Title VII and Other Statutes

The Ninth Circuit recognized in *Desert Palace* that it could not resolve the issues on appeal in that case merely by rejecting the direct evidence rule: it could not merely tell district courts in the Ninth Circuit how *not* to choose the standard of causation for discrimination cases; it had to provide some guidance about how courts *should* choose the standard of causation. While emphasizing that "'single-motive' and 'mixed-motive' cases [are not] fundamentally different categories of cases," *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002), the Ninth Circuit nonetheless adopted the split approach:

> If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of"[4] the prohibited reason. . . .
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> . . . .

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4. By "because of," here, the Ninth Circuit apparently meant to express a sole cause standard, even though the phrase "because of" is itself ambiguous; it requires causation but does

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> In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action.

Costa, 299 F.3d at 856-57.

Desert Palace sought review from this Court in part because it was concerned that the Ninth Circuit's decision would wrongly collapse the two traditional frameworks, making the "a motivating factor" standard the causation standard for "virtually all Title VII cases." Br. for Pet'r, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 742558 at *30. It warned this Court of this "danger": without the "cabining" effect of the direct evidence rule, "the mixed-motive approach . . . has the potential to swallow whole the traditional *McDonnell Douglas* analysis." *Id.* (internal citation and quotation marks omitted).

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not specify what level of causation. *See generally* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292 (1982) (explaining the ambiguity of the phrase "because of"). Unfortunately, the respondent in *Desert Palace* demonstrated a similar confusion. *See* Br. for Resp't, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No.02-679, 2003 WL 1786628 at *8 (suggesting that "[p]roof of an illicit motivating factor is sufficient to establish liability (under section 703(m)) without regard to whether the evidence also shows discrimination "because of" that factor (under the original section 703(a))").

In response, Costa explained to this Court that it was not necessary to read in a "direct evidence" requirement into Title VII in order "to avoid any conflict with the method of proof established by *McDonnell Douglas*," since *McDonnell Douglas* merely described one possible method of proving that the employer was motivated, at least in part, by a protected factor:

> Litigation in which a plaintiff relies on *McDonnell Douglas* and disputes involving mixed motives are not two distinct, mutually exclusive types of Title VII cases. Rather, as the Ninth Circuit correctly observed, the *McDonnell Douglas* caselaw and the mixed-motives analysis each address quite distinct issues. *McDonnell Douglas* concerns one manner in which a plaintiff might establish the existence of an unlawful *motive*. A mixed-motives analysis (under either section 703(m) or *Price Waterhouse*), on the other hand, is a method of proof on *causation*, after a plaintiff, by reliance on *McDonnell Douglas* or otherwise, has demonstrated the existence of an impermissible motive.

Br. for Resp't, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No.02-679, 2003 WL 1786628 at *29-*30. In contrast to Petitioner Desert Palace, who argued for the direct evidence rule, and to the Ninth Circuit, which adopted the split approach (distinguishing between "single motive" and "mixed motive" cases), Respondent Costa urged this Court to adopt a uniform approach, under

which all Title VII plaintiffs would face the "a motivating factor" causation standard:

> In all cases the burden of proof as to the existence *vel non* of a discriminatory motive remains on the plaintiff. If a plaintiff demonstrates that an illegitimate consideration was "a motivating factor," that will establish liability. . . .

Id. at 30.

Several of the *amici curiae* briefs submitted to the Court in *Desert Palace* focused on this aspect of the question presented. The Association of Trial Lawyers of America (now the American Association for Justice), for example, argued that "juries should be instructed consistent with the motivating factor standard in all cases" and explained that "[t]he distinction recognized by the Ninth Circuit between single-motive and multiple-motive cases is illusory." *Amicus Curiae* Br. of the Association of Trial Lawyers of America, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 1786625 at *23-*25.

Other *amici* also argued for the uniform approach:

> [The Ninth Circuit] assumes that the trial judge will always be able to decide whether to categorize a particular case as "single motive" or "mixed-motives" *before* submitting it to the jury. Unfortunately, this may not be true. There will be cases where the defendant argues that all of its motives were non-

> discriminatory but, as a second line of defense, contends it would have made the same decision in any event. Where the defendant offers multiple reasons for its actions, the plaintiff may initially argue that *all* of them are pretexts for discrimination. As a fall-back position, the plaintiff may contend that even if some of the defendant's given reasons are factually true, discrimination was at least "a motivating factor" in the employer's actions. Sometimes the plaintiff will frame the case as "single motive," but the defendant will frame it as "mixed-motives." Furthermore, the trier-of-fact may choose not to accept either party's litigating position as reflecting the whole truth.
>
> [Thus] [j]ury instructions must take into account the practical reality that whether a case is actually "single motive" or "mixed-motives" may depend on the jury's resolution of specific disputed facts.

Amici Curiae Br. for the Lawyers' Committee for Civil Rights Under Law, et al., *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 1785777 at 21-22 (internal citations and quotation marks omitted).

In fact, as the *amici* pointed out, the argument in *Desert Palace* over the proper proof framework for Title VII cases reached back to *Price Waterhouse* itself, where the United States, acting as *amicus curiae*, argued in

favor of a uniform approach. *See id.* at 20 n.10. According to the United States' brief in *Price Waterhouse*:

> In assessing the role of causation under Title VII, a number of lower courts have suggested that either the definition of causation or the burden of persuasion in establishing causation should vary depending on whether the case is categorized as one involving "mixed motives" or "single motives." We think this is a mistake.

Amicus Curiae Br. of the United States, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), No. 87-1167, 1988 WL 1025861 at *16 (citation omitted) (also available at *http://www.usdoj.gov/osg/briefs/1987/sg870104.txt*).

During the oral argument in *Desert Palace*, the Court demonstrated that it recognized the importance of this aspect of the question presented. Indeed, the discussion during the oral argument centered on the correct proof framework to apply in discrimination cases, in the absence of a direct evidence rule:

> Justice O'Connor: How do we know that those amendments [under the 1991 Civil Rights Act] apply only to mixed-motive cases? . . . [I]n theory, it could apply across the board.
>
> . . . .

> Justice Stevens: If there was no second motive [that is, if plaintiff did not argue or prove that motives were mixed], but merely there's evidence of . . . a motivating factor, period, isn't that enough?
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> . . . .
>
> Justice Souter: [I]s this correct, that *McDonnell Douglas* survives [only] in a case in which the defendant does not go forward with anything? . . . . So *McDonnell Douglas* survives [only] in the case of the mute defendant. In the non-mute defendant, [42 U.S.C. § 2000e](m) governs everything.
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> . . . .
>
> Justice Scalia: So any case that goes forward . . . is a mixed motive case.
>
> Mr. Peccole: Yes.
>
> Chief Justice Rehnquist: Yes.

Oral Argument, *Desert Palace v. Costa*, 539 U.S. 90 (2003), No. 02-679, 2003 WL 2011040 at *17-*37 (available in full on *http://www.oyez.org*).

However, while this aspect of the question presented in *Desert Palace* was thoroughly briefed and occupied much of the discussion during oral argument, it was not addressed in the Court's decision. Instead, the decision answered a narrower question, namely, whether in a

"mixed motive case" brought under 42 U.S.C § 2000e-2(m), courts should require direct evidence of discrimination before instructing the jury on the "a motivating factor" standard of causation. The answer to this narrow question was no; according to *Desert Palace*, every plaintiff in a "mixed motive case" bringing suit under § 2000e-2(m) can prove discrimination under the "a motivating factor" standard. *Desert Palace*, 539 U.S. at 92.

III. The Court Should Grant the Writ in Order to Provide Badly Needed Guidance to the Lower Courts Regarding the Correct Proof Framework to Apply in Discrimination Cases, in the Absence of a Direct Evidence Rule

Petitioner Jack Gross now asks the Court to grant *certiorari* in order to decide whether the reasoning behind the Court's rejection of the direct evidence rule in *Desert Palace* applies across the board, to every federal statute. *Amicus curiae* NELA joins Petitioner in urging the Court to grant *certiorari*, not only to answer this important question regarding the direct evidence rule, but also to answer an important related question: if courts in non-Title VII cases should not continue to use the direct evidence rule to select which standard of causation to apply, how *should* they determine which standard of causation applies? Should courts follow the split approach to causation, as described by the Ninth Circuit in *Desert Palace*, and suggested by this Court's apparent limitation of its holding in *Desert Palace* to "mixed motive cases"? Or should they follow the uniform approach urged by respondent and *amici* in *Desert Palace*, and by the United States in *Price Waterhouse*?

A. Courts' Uncertainty After *Desert Palace* Has Led to Caselaw in "Disarray"

Lower courts have been uncertain how to apply the holding in *Desert Palace*. This uncertainty, stemming from "the limited nature of the *Desert Palace* opinion," has led to "disarray" in the caselaw. Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 512 (2008). As Petitioner explains, courts have sharply divided over the question whether it is proper to continue to use the direct evidence rule outside of the Title VII context. But courts have also sharply divided over the related question regarding the proper standard of causation, both inside and out of the Title VII context. According to observers, courts are "plagued by confusion over the causal standard." *Id.* at 513; *see also* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 Hastings L. J. 643, 651 (2008) ("[E]ven in 1991 Act cases after *Desert Palace*, there remains some debate over the proper role of *McDonnell Douglas*. Some courts have found ingenious ways (a euphemism) to require certain 1991 Act plaintiffs to use *McDonnell Douglas*. So even after the demise of the 'direct evidence' distinction in 1991 Act cases, there remains some uncertainty over which framework might apply in those cases.")

One widely-discussed opinion decided shortly after *Desert Palace* attempted to guide the way to a uniform approach to causation. *See Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003), abrogated by *Griffth*

v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004). The court in *Dare* explained:

> In this case, Dare apparently pleads a single motive case. . . . Although the Supreme Court did not address these types of claims, based on the statutory analysis in *Desert Palace*, this Court finds that the holding in *Desert Palace* applies to Dare's claims. "[T]he words of the statute are unambiguous" and nothing in the plain meaning of § 2000e-2(m) and § 2000e-5(g)(2)(B) expressly restricts the Civil Rights Act of 1991 to mixed-motive cases.

Dare, 267 F. Supp. 2d at 990-91. Thus, the court concluded, all Title VII plaintiffs, including Dare, can establish liability by proving that discrimination was "a motivating factor." *Id.* at 991.

Ironically, perhaps, the judge who decided *Dare*, the Honorable Paul A. Magnuson, later sat by designation on the 8th Circuit panel that effectively abrogated the decision. *See Griffith* at 734. Judge Magnuson reiterated in his concurring opinion in *Griffith* why courts should adopt a uniform approach to causation, suggesting, among other reasons, that without the direct evidence rule, there is simply no apparent "basis on which to determine whether to apply a *McDonnell Douglas* analysis or the alternative mixed-motive analysis." *Id.* at 745 n.8 (Magnuson, J., concurring).

Judge Magnuson's arguments in *Dare* and *Griffith* in favor of the uniform approach to causation are not uniformly accepted, however. Many courts that have set

aside the direct evidence rule in light of *Desert Palace* continue to distinguish between "single motive" and "mixed motive" cases.

Ginger v. District of Columbia, 527 F.3d 1340 (D.C. Cir. 2008) provides one example of this split approach. Plaintiffs in *Ginger* were eight police officers who alleged that the Metropolitan Police Department changed their shifts on racial grounds. *Id.* at 1341. A memorandum by a Department officer seemed to demonstrate that race was a motivating factor in the shift changes, since it expressly stated that "[t]he proposed reorganization of the squads must also take into account the racial make up of those squads." *Id.* at 1342. Nonetheless, the lower court granted summary judgment in favor of the defendant and the Court of Appeals for the District of Columbia affirmed. *Id.* at 1347. The Court of Appeals explained its reasoning under the split approach to causation:

> There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the sole reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. *See* 42 U.S.C. § 2000e-2(a)(1). Alternatively, he may bring a "mixed motive case," in which he does not contest the *bona fides* of the employer's justification but rather argues race was also a factor motivating the adverse action. *See* 42 U.S.C. § 2000e-2(m).

Id. at 1345. According to the court, the plaintiffs in *Ginger* elected to pursue a single motive case. *Id.*

Because there was evidence that the Department had other reasons besides race for changing the plaintiffs' shifts, the court held that no reasonable jury could conclude that "race [was] the sole motivation for reorganizing the unit," and affirmed summary judgment. *Id.* at 1346. In an aside, the court noted that "[t]he officers might have had a compelling case had they argued race was [merely] one of multiple motivating factors behind the reorganization." *Id.* at 1345.

In another example of a decision under the split approach to causation, it was the defendant who – at least in the court's view – elected the single motive framework. In *Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007), the defendant, the United States Marshals Service, "argued in its motion for judgment as a matter of law . . . that Fogg's case 'falls far short of what is necessary to prove that the proffered reason for [his] termination (insubordination) was a pretext for discrimination and retaliation.'" *Id.* at 451. Because the defendant used the label "pretext," the lower court concluded that the defendant had elected to defend the case as a single motive case, and therefore could not argue for a limitation in remedies under the "same decision" affirmative defense. *See id.* at 451-52. The Court of Appeals affirmed on the same grounds. *Id.* at 454.

Fogg and *Ginger* suggest some of the difficulties presented by the split approach to causation. Arguably, they demonstrate that Judge Magnuson was correct when he suggested in *Griffith* that – in the absence of the direct evidence rule – courts lack an adequate "basis on which to determine whether to apply a *McDonnell*

Douglas analysis or the alternative mixed-motive analysis." *Griffith* at 745 n.8 (Magnuson, J., concurring). Taken together, these cases underscore the need for greater clarity in the wake of *Desert Palace*. "In short, there remain many unanswered questions, and courts throughout the nation have been struggling to navigate the morass of competing rationales and instructions when seeking to properly adjudicate employment discrimination claims." *Sawicki v. Morgan State University*, 2005 WL 5351448 at *5 (D. Md. Aug. 2, 2005) (not reported in F. Supp. 2d).

B. A Plea for Guidance

The opinion in *Desert Palace* contains fewer than 4000 words. It is, in the words of one commentator, "short and sweet." Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 Emory L.J. 1887, 1919 (2004). As such, some might see it as the perfect example of what Professor Cass Sunstein has referred to – and praised – as "judicial minimalism," that is, "the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3-4 (1999).

But even minimalism can go too far. Professor Sunstein argues that "leaving as much as possible undecided" only makes sense in cases in which "American society is morally divided, those in which the Court is not confident that it knows the right answer, and those in which the citizenry is likely to profit from more sustained debate and reflection." *See* Cass R.

Sunstein, *Testing Minimalism: A Reply*, 104 Mich. L. Rev. 123, 128 (2005). Otherwise, minimalism may simply "'export' decision costs to other people, including litigants and judges in subsequent cases who must give content to the law." Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 Mich. L. Rev. 1951, 2005 (2005) (quoting Sunstein, *One Case at a Time*, at 48).

Because *Desert Palace* appears to fit more closely into the latter category, it has been criticized as "cryptic," rather than praised as minimalist. *See Sawicki*, 2005 WL 5351448 at *5. Some of the criticism has been fairly blunt:

> [T]he [*Desert Palace*] Court made no mention of the relationship between its holding and the well-established analytical framework for employment discrimination cases that the lower courts use virtually every day. Although the Court could not possibly have answered all of the questions about the interaction of [*Desert Palace*] with other precedents, its silence suggests a lack of either awareness or concern that [*Desert Palace*'s] impact is likely much further-reaching than its "Questions Presented" suggested.

Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash. & Lee L. Rev. 271, 330 (2006).

Similarly:

> In *Desert Palace*, the Supreme Court was presented with an opportunity to resolve some of this confusion by speaking retrospectively about these strands of disparate treatment law and the relationship, if any, between the competing yet overlapping methods of proof. But the Court did neither.

Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 Stan. J. C.R. & C.L. 1, 6 (2005).

The sheer volume of this criticism is attested to by the numerous law review articles that have been published since *Desert Palace* was decided (23, at last count), promising to make sense of the "fundamental incoherence" in the law. *See, e.g.*, Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L.J. 480 (2006); Jeffrey A. Van Detta, *Requiem for a Heavyweight: Costa as Countermonument to McDonnell Douglas - A Countermemory Reply to Instrumentalism*, 67 Alb. L. Rev. 965, 1002-1011 (2004) (describing the "intellectually flawed" and "misguided" approach being used by many district courts that "try to engraft *Costa* and Section 703(m) into the *McDonnell Douglas* framework"); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 Notre Dame L. Rev. 109 (2007) (attempting to "make sense of the doctrinal morass that currently envelops disparate treatment antidiscrimination law").

But of course, not all of the current confusion can be tied to the cryptic opinion in *Desert Palace*. Discrimination law "suffers under the strain and fissures of 40 years of incremental, common law decision-making," *Kaminshine, supra*, at 3, and no one decision – whether it be in *Desert Palace* or in the instant case – can possibly eliminate all of the uncertainties. It would be inappropriate to ask the Court for such "judicial maximalism."

Instead, *amicus curiae* NELA, on behalf of its members who litigate these cases every day, and the courts that must decide them, respectfully asks this Court to grant certiorari in this case and to issue a "right sized" decision – one which resolves the lingering questions regarding the ill-conceived direct evidence rule, while also providing as much guidance as possible on the proper causation standard for discrimination cases, going forward.

CONCLUSION

For the above reasons, amicus curiae NELA respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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JOINT APPENDIX

118 (5) No. 08-441

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In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

Case # 4:04-CV-60209

Date	Docket #	Description
4/13/04	1	COMPLAINT (Summons(es) was issued); Rule 16 Dismissal Notice set for 8/11/04; Dismissal ddl (service) set for 8/11/04 (don) (Entered: 04/14/2004)
6/28/05	43	MOTION for Summary Judgment by FBL Financial Group, Inc., Responses due by 7/22/2005 (Hulett, Debra) (Entered 6/28/2005)
10/13/05	81	ORDER granting in part and denying in part *43* Defendants' Motion for Summary Judgment. Entered by Thomas J. Shields on 10/13/2005. (dam) (Entered: 10/13/2005)
10/24/05	83	Proposed Jury Instructions by FBL Financial Group, Inc.. (Hulett, Debra) (Entered: 10/24/2005)
10/25/05	92	Proposed Jury Instructions by Jack Gross. (Carroll, Michael) (Entered: 10/25/2005)

10/30/05	109	Revised Proposed Jury Instructions by FBL Financial Group, Inc.. (Hulett, Debra) Modified on 10/31/2005 add revised (don,). (Entered: 10/30/2005)
10/31/05	112	Minute Entry for Proceedings Held Before Thomas J. Shields : Voir Dire held on 10/31/05. Day 1 jury trial (Court Reporter Terri Martin.) (don,) (Entered: 10/31/2005)
11/1/05	113	Preliminary Jury Instructions. (jeb) (Entered: 11/01/2005)
11/2/05	115	Proposed Jury Instructions by Jack Gross. (Carroll, Michael) (Entered: 11/02/2005)
11/4/05	123	Final Jury Instructions. (don,) (Entered: 11/04/2005)
11/4/05	125	JURY VERDICT. (don,) (Entered: 11/04/2005)
11/4/05	126	JUDGMENT in Favor of Jack Gross against FBL Financial Group, Inc. Entered by Marjorie Krahn, Clerk on 11/4/2005. (don,) (Entered: 11/04/2005)
11/17/05	134	MOTION for Judgment as a Matter of Law *or in the Alternative Motion for New Trial* by FBL Financial Group, Inc.. Responses due by 12/5/2005 (Hulett, Debra) (Entered: 11/17/2005)

6/23/06	161	ORDER denying *134* Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New Trial. Entered by Thomas J. Shields on 6/23/06. (jeb) (Entered: 6/23/2006)
7/18/06	164	NOTICE OF APPEAL as to *161* Order on Motion for Judgment as a Matter of Law, *126* Judgment by FBL Financial Group, Inc.. Fee paid in the amount of $455. (Attachments: # *1* Appeal Form A) (Hulett, Debra) (Entered: 07/18/2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JACK GROSS, Plaintiff, vs. FBL FINANCIAL SERVICES, INC., FBL FINANCIAL GROUP, INC., IOWA FARM BUREAU FEDERATION, and FARM BUREAU MUTUAL INSURANCE COMPANY, Defendants.	Civil No. 4:04-cv-60209 TRANSCRIPT OF TRIAL VOLUME II

Courtroom, First Floor
U.S. Courthouse
123 East Walnut Street
Des Moines, Iowa
Tuesday, November 1, 2005
8:45 a.m.

BEFORE: THE HONORABLE THOMAS J. SHIELDS,
Magistrate Judge, and a Jury.

GROSS – DIRECT

* * *

[181] A. like I always had was gone. I was very stressed and even more stressed when I came to the conclusion, after a lot of thought and prayer, that this

was just wrong and somebody had to step up and say something, so –

Q. Was it an easy decision for you to decide to take action against Farm Bureau?

A. It was the worst decision in my life.

Q. And when you say "worst," what do you mean by that?

A. Farm Bureau is a company that I've dedicated my life to, and I've loved this company. I've given everything to it, and they've been good to me. I had always had a career path. If I worked hard, there was a place to go if I did all the right things and, of course, you do all of that, you know, with that pension in mind out there, you keep plugging away and plugging away and working hard, and you have your retirement pretty well lined out, and then all of a sudden one day you're a class of people who they decide to come in and lop off half of that carrot and you don't think it's because of anything you did. The only common thread that we had was just because we were getting old.

Q. And what makes you think that the actions that Farm Bureau took against you in 2003 were based on your age?

A. Well, No. 1, in Kansas everybody over 50 got bought out. They just didn't want over 50 people down there. All of the people in the Iowa operation who had been there a significant [182] amount of time and had, you know, achieved a degree of success

were getting paid well. We were all pretty much taken down at the same time, not based on performance. The only common thread was age. And there was a merger and there was a reorganization. There's another reorganization this year, two years later, and it looks like again 55 people are going to get hurt by it.

Q. Are there any other factors that make you think that this had to do with your age?

A. It was just a lack of any other reason.

Q. How did the 2003 demotion affect your motivation as a Farm Bureau employee?

A. Well, I no longer had a career, there's no place to go. I couldn't move ahead anymore, and I found out from the memo that was written in August of 2000 that this was all preordained, somebody had decided to end my career long before I was even aware of it.

Q. And you're referring to the memo that was written by Mr. Oddy or at least from Mr. Oddy to the executive committee?

A. As far as we knew, it was written by Mr. Oddy at the time, yes.

Q. Where they specifically reference you?

A. Yes, and everybody that was referenced specifically was in my age bracket.

Q. Okay. And was going to suffer the same impact in terms of

* * *

JACK GROSS V. FBL FINANCIAL GROUP, INC.

VERDICT FORM NO. 1

Complete this form if you find in favor of plaintiff.

We the jury find in favor of plaintiff Jack Gross and against FBL Financial Group, Inc. and award damages as follows:

a. Lost past salary	$20,704.00 (stating the amount, if any)
b. Lost past stock options	$26,241.00 (stating the amount, if any)
c. Emotional Distress	$_____ (stating the amount, if any)

If you found in favor of plaintiff, you must answer the following question.

Was defendant's conduct "willful" as that term is defined in Instruction No. 13? (Place an "X" in the appropriate space.)

Yes_____ No __X__

Please date and sign the form and inform the Court Security Officer that you have completed your deliberations.

Dated this 4 day of November, 2005.

_____

FINAL INSTRUCTION NO. 10

(Filed Oct. 24, 2005)

Your verdict must be for Plaintiff if both of the following elements have been proven by the preponderance of the evidence:

1) Defendant demoted Plaintiff to claims projector coordinator effective January 1, 2003; and

2) Plaintiffs' age was the determining factor in Defendant's decision.

If either of the above elements has not been proven by the preponderance of the evidence, your verdict must be for Defendant.

"Age was a determining factor" only if Defendant would not have made the employment decision concerning Plaintiff but for his age; it does not require that age was the only reason for the decision made by Defendant.

Authority

Eighth Circuit Model Civil Instruction 5.11A

FINAL INSTRUCTION NO. 11

Your verdict must be for plaintiff if all the following elements have been proved by the preponderance of the evidence:

First, defendant demoted plaintiff to claims project coordinator effective January 1, 2003; and

Second, plaintiff's age was a motivating factor in defendant's decision to demote plaintiff.

However, your verdict must be for defendant if any of the above elements has not been proved by the preponderance of the evidence, or if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age. You may find age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination.

FINAL INSTRUCTION NO. 12

As used in these instructions, plaintiff's age was a "motivating factor," if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff.

UNITED STATES DISTRICT COURT
IN AND FOR THE
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JACK GROSS, Plaintiff, vs. FBL FINANCIAL SERVICES, INC., et al., Defendants.	CIVIL NO. 4-04-CV-60209 TJS **ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Oct. 13, 2005)

Jack Gross (Gross) went to work for Farm Bureau Insurance upon his graduation from Drake University in Des Moines, Iowa in late 1970 or in early 1971. Until 1976, he was an adjuster covering three counties in southeast Iowa: Washington, Louisa and Jefferson. At that point, he became a regional manager for Farm Bureau in southwest Iowa, a job he held for approximately two and a half years.

He left Farm Bureau to work for a seed corn company, followed by work in other unrelated businesses.

In 1987, Gross returned to Farm Bureau, first as a field adjuster working out of Farm Bureau County offices until 1988, when he was involved in the opening of a claims center near the West Des Moines office of Farm Bureau.

In 1990, he was promoted to District Claims Manager, supervising adjusters in the field; in 1993 he was promoted again to Training Administer [sic], along with additional responsibilities for commercial liability claims. During this same period, Farm Bureau operations in Arizona and New Mexico became affiliated with Iowa Farm Bureau.

Between 1990 and 2000, Gross was promoted several times to Director of Claims Administration, and then to Claims Administration Vice President.

Notwithstanding the eight or nine-year period that Gross did not work for Farm Bureau, he was given credit for all his years of service combined for purposes of retirement.

During his tenure with Farm Bureau, Gross participated in continuing education. Through these programs, he obtained his Chartered Property Casualty Underwriter Certification (CPCU); his Chartered Financial Consultant Certification (CHFC); became a Chartered Life Underwriter (CLU); became an Associate in Claims (AIC); and an Associate in Underwriting (AIU). *See*, *generally*, Gross deposition, pp. 21-24; 29-36, plaintiff's exhibit, pp. 27-29.

In early 2000, discussions began within Farm Bureau regarding restructuring of the claims department of which Gross was a Vice President. *See*, memorandum dated April 11, 2000 from Tom Eppenauer to Barbara Moore, plaintiff's appendix, p. 118. Eppenauer was Gross' immediate superior;

Eppenauer in turn reported to Moore. At the same time, plans were underway to replace the head of the claims department, which would be reconstituted from a four-state operation to a six-state operation. Andy Lifland (Lifland) was asked by Moore to move from Arizona to Des Moines to take over the responsibility for the claims department, resulting from the restructuring. *See*, copy of e-mail from Lifland to Moore dated May 28, 2000, plaintiff's appendix, p. 123.

In an August 1, 2000 memorandum to Farm Bureau's Executive Committee from its then-current president Bill Oddy, he detailed the "realignment" of the claims department. *See*, plaintiff's appendix, pp. 124-130. That memorandum states in pertinent part that

> The existing claims structures in all six states will be simplified to generate considerable expense savings. A number of management and specialists positions will be re-pointed or eliminated without reducing the level of claims service being provided. This means going back to basics – empowering multi-line adjusters supervised by multi-line managers – eliminating dual supervision of claim files.
>
> * * *
>
> The six states will be divided into four regions with a regional claim manager for each supervising 4 or 5 district claims managers. This structure is suited for

growth – each region could add several districts with a full staff of adjusters without adding another region. The regional claims managers would report directly to the claims vice president, eliminating a layer of management and three additional vice presidents.

The new organizational chart has only one claims vice president for all six states. There are 4 regional managers with 16 district managers reporting to them. The district claims managers would supervise all personnel but handle claims in that district – this includes field and inside adjusters, appraisers and clerical assistants. District claims managers would be empowered to supervise all aspects of their adjuster's claims, including litigated files with assistance from their regional managers, the litigation specialist and the legal department.

* * *

The new structure is estimated to reduce the number of personnel from 258 to 229, saving 29 positions. This is just an estimate as we may need to add more multi-line adjusters if the specialist positions such as the BI-tech specialists are eliminated. We need to better understand how much clerical support is really needed, and we may need more than sixteen district managers due to their increased responsibility levels.

Actions:

1. Andy Lifland will be promoted to Claims Vice President for all six states. . . .

2. The six states will be divided into four regions with . . . Larry Hills in charge of the western Iowa and South Dakota regions . . .

3. Noel McKibbin and Gale Juhl will be designated litigation specialists with Gale reporting to Noel and Noel reporting to Andy. Their points will be adjusted to their new positions.

4. Jack Gross' title will be changed to claims administration manager and his points not changed until the rest of the changes in his area are accomplished.

5. Tom Eppenauer will have the responsibility of claims training administrator reporting to Andy Lifland. His salary will be frozen, his points and grade level reduced. His salary is not to be reduced . . .

Short Term:

* * *

Long Term:

* * *

2. Reducing the points for Tom Eppenauer, Noel McKibbin, Gale Juhl, Jack Gross and the state claims mangers mentioned

> above will have long term financial impact as their salary increases will be modest.

While the 2000 restructuring resulted in Gross being demoted to claims administration director, it did not result in either a reduction in pay or in points. In 2003, Farm Bureau merged with Farm Bureau Insurance Companies in Kansas and Nebraska. As a result of that merger, Gross claimed that he was demoted, and while his salary did not decrease, his points under the Hay schedule, and which relate most exclusively to the ultimate pension paid, was drastically reduced.

While Gross characterized the change in 2000-2001 as a demotion, he believed he had a "vital, real role" with the company. After the merger, and what he characterized as his second demotion, he claims that his job duties were split between Steve Wittmuss (Wittmuss) and Lisa Kneeskern (Kneeskern).

Gross claims that other individuals also over the age of 50 received demotions at the same time, including: Thomas Eppenauer (Eppenauer); Gary L. Henton (Henton); Larry J. Hills (Hills); Gale E. Juhl (Juhl); Noel McKibbin (McKibbin).

Subsequent to the 2003 demotion, Gross filed a complaint with the Iowa Civil Rights Commission, and received a right to sue letter. He then commenced suit in this Court, and has alleged in his corrected amended complaint *inter alia* that his second demotion in 2003 when he was 54 years old was for

no "apparent reason;" and that the job title he was given at that time, Special Project Coordinator, contained no job description. These actions he has alleged resulted in his salary being frozen or severely limited for the remainder of his working career, with a reduction in any bonus to which he may be eligible, and removal of his stock options. Gross claims that defendant violated the Age Discrimination and Employment Act (29 U.S.C. § 621 et seq.) and that these actions constituted discrimination because of his age in violation of the Iowa Civil Rights Act (ICRA), Chapter 216, Code of Iowa.

Gross continues to work for FBL.

The foregoing recitation of facts is made by the Court in a light most favorable to plaintiff.

SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56, this Court must determine whether there are any material issues of fact in dispute that require trial, based on the evidence contained in the record before it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

If a party fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, summary judgment is mandated pursuant to Rule 56(c). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When ruling on a summary judgment motion, the Court must view the evidence "in the light most favorable to the non-moving party." *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002); *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962-63 (8th Cir. 1997) (citing *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997)). However, a "nonmovant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial." *Naucke*, 284 F.3d at 927; *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). In this regard, the ultimate burden of proof is upon FBL to establish that there are no material facts in dispute and that, as a matter of law, it is entitled to judgment. *Oldham v. West*, 47 F.3d 985, 988 (8th Cir. 1995); (citing *Matsushita Elec. Inds. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 and *Celotex Corp. v. Catrett*, 477 U.S. at 322).

Assessing the credibility of witnesses and evaluating a weight to assign to their testimony is the job of the fact-finder, and is not a function for the Court on a motion for summary judgment. Where there are witnesses whose testimony raise genuine issues of material facts, summary judgment is inappropriate. *U.S. v. Dico, Inc.*, 136 F.3d 572, 579 (8th Cir. 1998); *Oldham v. West*, 47 F.3d at 988-89.

THE LAW

District courts are cautioned that summary judgment should seldom be granted in employment discrimination cases because intent is often the central issue and claims are often based on inference. *Peterson v. Scott County*, 406 F.3d 515, 520 (8th Cir. 2005); *Wheeler v. Aventis Pharm.*, 360 F.3d 853, 857 (8th Cir. 2004); *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999); *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1099 (8th Cir. 2000).

The Eighth Circuit Court of Appeals in *Johnson v. Ready Mixed Concrete Co.*, ___ F.3d ___ (2005) 04-3924, noted

> In one of our most oft-quoted passages, we said in 1994 that "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions." *Harvey v. Anheuser Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994) (internal quotations omitted). One reason we emphasize this point is that a number of plaintiffs present a sympathetic situation in which the employer's judgment . . . may appear poor or erroneous to outsiders. It is tempting to think that the role of the federal courts is offer a remedy in that sort of case. . . . Our authority is to determine only whether there is a genuine issue for trial . . .

The Age Discrimination and Employment Act (ADEA), 29 U.S.C. §§ 623(a)(1) and 631(a) makes it

unlawful for employers to discriminate on the basis of an individual's age if that individual is over 40 years old. *Breeding*, 164 F.3d at 1156; *Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 497 (8th Cir. 1998).

If there is direct evidence of age discrimination, the Court follows the standard set forth in *Price Waterhouse v. Hopkins*, 49 U.S. 228, 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1999). However, if the plaintiff seeks to establish this discrimination through indirect evidence, then the Court must follow the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

These different standards were explained by the Eighth Circuit Court of Appeals in *Breeding*, 164 F.3d at 1156-57:

> . . . "When a plaintiff puts forth direct evidence that an illegal criterium, such as age [or sex] was used in the employer's decision to terminate the plaintiff," we apply the standards enunciated in *Price Waterhouse v. Hopkins*, as modified by § 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). *Fast v. Southern Union Railroad Co.*, 149 F.3d 885, 889 (8th Cir. 1998). Under this modified *Price Waterhouse* standard, a defendant is liable for discrimination upon proof by direct evidence that an employer acted on the basis of a discriminatory motive, and proof that the employer would have made the same decision absent the

> discriminatory motive is only relevant to determining the appropriate remedy. *See*, *Id.*
>
> When a plaintiff is unable to put forth direct evidence of age or sex discrimination, we apply the burden-shifting analysis of *McDonnell Douglas*, which first requires the plaintiff to demonstrate a prima facie case of discrimination. *Id.* at 890, 93 S.Ct. 1817; *see also, Rothmier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1332 n.5, (8th Cir. 1996) (explaining that we apply this framework in both Title VII cases and in the ADEA context). The elements of a prima facie case are not inflexible and vary slightly with the specific facts of each case. *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990-91 (8th Cir. 1998).

Gross must demonstrate (1) that he is within the protected class; (2) that he was qualified to perform his job; (3) that he suffered an adverse employment action; and (4) that nonmembers of his class (persons under 40 in the ADEA context) were not treated the same. *Breeding*, 164 F.3d at 1156; *Niebert v. Thomson Newspapers, Michigan, Inc.*, 129 F.3d 444, 451 n.4 (8th Cir. 1997) (defining the prima facie case in the ADA context); *Lyoch v. Anheuser-Busch Cos.*, 139 F.3d 612, 614 (8th Cir. 1998) (defining the prima facie case in Title VII context).

If plaintiff has establish these prerequisites, then the burden shifts to FBL to demonstrate a legitimate nondiscriminatory reason for the adverse employment action. *Breeding*, 164 F.3d at 1156; *Fast v. Southern*

Union Railroad Co., 149 F.3d at 890. If FBL articulates such a reason, Gross must then demonstrate that FBL's stated reasons are pretextual and that the real reason for FBL's adverse employment action was unlawful age discrimination. *Breeding*, 164 F.3d at 1157; *Fast v. Southern Union Railroad Co.*, 149 F.3d at 890; *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 777 (8th Cir. 1995).

This Court in differentiating between direct and indirect evidence of age discrimination must distinguish comments which demonstrate a discriminatory animus in the decisional process from stray remarks or statements by non-decision makers, and statements made by decision makers which are unrelated to the decisional process. *Breeding*, 164 F.3d at 1157; *Fast v. Southern Union Railroad Co.*, 149 F.3d at 889.

DISCUSSION

Defendant FBL's Motion for Summary Judgment is granted in part and denied in part.

Gross has not demonstrated that there are any material issues of fact in dispute regarding his claim of retaliation. While it is true that after Gross filed his claim with the ICRC, Lifland continued to do his evaluations, the Court does not find as a matter of law that the fact Lifland gave Gross scores on his annual evaluations that were lower than those previously given him by Lifland's predecessor, Eppenauer, establishes retaliation. Certainly, the

appearance of unfairness may have been fostered by Lifland's actions. The record, in the opinion of the Court, establishes that Lifland was a very detached, uncommunicative manager, and that generally he scored most of the employees who reported to him much lower on these annual evaluations than they had previously received from other managers.

While Gross was no doubt disappointed, and arguably humiliated by these lower scores, there was no other tangible adverse employment action.

Gross has not demonstrated that these lower scores translated into further job demotion, wage reduction or loss of Hay points.

A prima facie case of discrimination, including retaliation, requires Gross to present evidence of an adverse employment action brought on by the employer's discriminatory motive. *McGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 927-28 (8th Cir. 2004), citing *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016 (8th Cir. 1999) (the adverse employment action must be one that produces a "material employment disadvantage.") Here, the lower evaluation scores began before Gross complaint to ICRC, and continued after he took that action.

Gross has not presented a prima facie case of retaliation, because he has not demonstrated that he engaged in protected conduct, and as a result suffered an adverse employment action which was linked causally to the protected conduct. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999);

Montangon v. Farmland Inds., Inc., 116 F.3d 355, 359 (8th Cir. 1997); *Evans v. Kansas City, Mo. Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995). *See, generally, Kasper v. Federated Mutual Insurance Company*, ___ F.3d ___ (8th Cir. 2005) (No. 04-3437).

FBL's Motion for Summary Judgment on the issues raised by Gross pursuant to the ADEA is denied. The Court is satisfied after reading the deposition excerpts provided by both parties of Gross, Lifland, Moore, Oddy, Eppenauer, Henton, McKibbin, Juhl, Kneeskern, Hills, Wittmuss, Johnson and Mincks that there are material issues of fact in dispute regarding Gross' demotion as a result of the 2003 merger that FBL undertook. The August 2000 memo authored by Oddy adds background facts to the deposition testimony of the individuals noted above.

The Court has noted above that its function at this juncture is not to weigh the credibility of any witnesses. In arriving at its conclusion that there are material issues of fact in dispute regarding the 2003 demotion, the Court is looking specifically at a great number of matters that were in flux as a result of the 2003 merger.

There seem to have been a number of realignments of various positions, some of which appear to be only temporary, but nonetheless which certainly evidenced on the one hand a master plan that was hardly thought through and analyzed before being put in place, and arguably on the other hand nothing more than a subterfuge for saving FBL

substantial sums of money by removing a number of long-term employees, some of whom were over the age of 50, and reducing their pension formulas.

In particular, the Court focuses on the demotion of Gross from a particularly responsible job, involving claims management and procedure, to a "special projects" position, which appeared to have no specific job function. In addition, the promotion of Kneeskern from a worker compensation claims manager to a position that nearly paralleled Gross' prior position raises issues of fact that must be determined by the jury.

The Court is satisfied that there can be overt as well as discrete discrimination. As the Eighth Circuit has noted in *McGregor v. Mallinckrodt, Inc.*, 373 F.3d at 928 whether there has been an adverse action is an issue of fact for a jury to determine. *See also*, *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1061-62 (8th Cir. 1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997). The Court is satisfied that reasonable minds could differ as to the impact of this evidence. *Anderson v. Liberty Lobby*, 477 U.S. at 250.

The deposition testimony of the witnesses provided to the Court do not provide any cohesive explanation or understanding as to the results of the 2003 merger. The Court has noted above that because employment discrimination cases frequently turn on inferences rather than direct evidence, it must be particularly deferential to the non-moving party. *Peterson v. Scott County*, 406 F.3d at 520.

Thus, the issue as to whether plaintiff can establish a pattern of similar treatment of other employees over the age of 50 years also remains a question of fact.

There is a substantial amount of discussion by the parties regarding personalities of the various persons who are integral to the suit in question. While these matters may well be appropriate at trial, the Court is not in a position at this point under Rule 56 to make specific findings on very subjective issues that would apparently seem to support FBL's arguments as to why Gross was demoted, and why those reasons were justification for other employment actions it took. Those facts again are for the trier of fact.

Succinctly stated, this Court is the opinion that there are material issues of fact in dispute as to the pretextual issue pertaining to the alleged age discrimination by FBL. FBL has conceded for the purposes of its Motion for Summary Judgment that Gross can establish the first three elements of a prima facie case of discrimination: (1) he is a member of a protected age group; (2) he was performing his job at a level that met his employer's legitimate expectations; and (3) he suffered an adverse employment action. *Breeding*, 164 F.3d at 1156.

It is the fourth element of the prima facie case requirement that the Court finds generate [sic] material issues of fact in dispute: whether Gross' position was filled by a substantially younger worker. Added to

this is the Court's finding that there are material issues of fact as to both whether FBL has demonstrated a legitimate nondiscriminatory reason for the adverse employment action *and* whether Gross has demonstrated that FBL's stated reasons are pretexual.

The deposition testimony of Gross, Kneeskern, Lifland, and to a great degree Moore, clearly throw this matter in factual dispute. The Court has noted above that there were a number of individuals shifted in the 2003 merger, but more importantly, a number of positions were reorganized and it appears some duties and responsibilities were shifted to other positions, while primary functions stayed with individuals who were newly assigned to the redesignated, and reclassified jobs. Further, a careful reading of the Oddy August 1, 2000 memo further casts shadows on the reasons FBL has given for Gross' 2003 demotion.

The Court is concerned about how this restructuring was orchestrated, and believes that it is for the trier of fact to determine why it was done, and for what purposes.

The Court feels the need to make several comments at this stage. First, the parties submitted a voluminous amount of material, both in support of the Motion for Summary Judgment, and in resistance to that motion. While the Court has not obviously reviewed every exhibit that could likely be offered at trial, certainly the amount of testimony that was

reviewed comes close to comprising almost all relevant trial testimony. After reviewing all these documents, the undersigned magistrate judge has at times felt as if he had tried this case, but for the constraints placed by Rule 56(c).

These comments are not meant as criticism of either party or their lawyers. These comments are prompted by the recognition, and regret, that too few cases proceed to trial; far too much effort, and hope, seems to be directed toward the preparation of dispositive motions. There is no question that much of this work is required in the course of trial preparation. Too often, rulings on motions for summary judgment result more in immediate settlements of cases than they do in establishing the proper framework for a trial.

A recent memorandum filed by Senior District Judge Milton I. Shadur in *George v. American Airlines, Inc.*, 378 F.Supp.2d 87 (N.D. Ill. 2005) has come to the undersigned magistrate judge's attention. That memorandum eloquently reflects the frustrations and concerns facing the trial judge who considers and rules upon motions for summary judgment.

In particular, Judge Shadur noted

> Next, because the legal standard for victory under Rule 56 is identical to the standard for judgment as a matter of law under Rule 50(a) (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d

> 202 (1986) is the seminal case announcing that principle, which has been repeated innumerable times by courts around the country), defense counsel lose nothing by going to trial: If they are right in viewing their client's position as a slam dunk, they can prevail via a Rule 50(a) motion at the close of plaintiff's case. If so, they are spared the need to go forward with their case in chief.
>
> Indeed, even if the District Judge (whether out of caution or otherwise) takes the Rule 50(a) rule under advisement, the worse that happens is that the evidentiary portion of the trial gets completed – and defendant then wins, either before the jury or by the judge's Rule 50 ruling. (Footnote omitted) By contrast, if . . . counsel's judgment in filing a summary judgment motion has been flawed and the motion loses, the parties are back to the Berra fork in the road and must go down the path for trial – so that the Rule 56 motion has generated a total waste of effort.

There is nothing wrong with cases going to trial. Trials tell the court and the lawyers what the community feels about legal conflicts. Merely because a party is unsuccessful in a dispositive motion does not mean that the trier of fact will decide adversely to the moving party; it only means that the trier of fact will have ample opportunity to consider and decide the factual disputes that brought the parties to court in the first place.

IT IS SO ORDERED.

Dated this 13th day of October, 2005.

/s/ Thomas J. Shields
THOMAS J. SHIELDS
UNITED STATES
MAGISTRATE JUDGE

PETITIONER'S BRIEF

18 (6) No. 08-441

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In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a *Mt. Healthy* mixed motive instruction in a non-Title VII case?

PARTIES

The parties to this proceeding are set forth in the caption.

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decision in the absence of that discriminatory purpose. All the lower courts agree, as did the court below, that (in at least some circumstances) the burden of proof regarding what would have occurred in the absence of discrimination may be imposed on the defendant.[23] That allocation of the burden of proof derives from this Court's decision in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977). The Eighth Circuit erred in holding that a *Mt. Healthy* mixed motive instruction[24] can be given only when the plaintiff has met a special

---

[23] Although, the employer bears that burden of proof regarding this issue, a plaintiff might voluntarily assume that burden. Thus, although an ADEA plaintiff would be entitled to the instruction given in this case, the plaintiff could opt for a less favorable (but simpler) instruction, under which the plaintiff would be required to show that any proven discriminatory factor made a difference to the outcome. See *Price Waterhouse*, 490 U.S. at 246 n.11 (plurality opinion), 276 (O'Connor, J., concurring), 282 (Kennedy, J., dissenting).

[24] The lower courts occasionally refer to the sort of instruction given in this case as a "mixed motive instruction." That phrase is somewhat confusing, because *any* instruction dealing with who bears the burden of proof regarding what an employer would have done in the absence of discrimination would be an instruction about mixed motives. In the instant case, respondent's proposed instruction (J. App. 9), like the instruction given by the trial court, dealt with mixed motives, but would have placed the burden of proof on the plaintiff rather than the defendant.

We refer to a mixed motive instruction placing the burden of proof on the defendant as a *Mt. Healthy* mixed motive instruction, in order to distinguish it from the type of mixed motive instruction proposed by respondent.

elevated standard of proof, demonstrating by direct evidence the existence of a discriminatory motive.

I. THE ADEA SHOULD NOT BE CONSTRUED TO IMPOSE ANY ELEVATED EVIDENTIARY STANDARD IN THE ABSENCE OF AN EXPRESS STATUTORY DIRECTION

This Court has repeatedly refused to impose special standards of proof on civil litigants. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court held that a Title VII defendant which seeks to show that it would have made a disputed decision in the absence of discrimination need not prove that fact by clear and convincing evidence. 490 U.S. at 252-53 (plurality opinion), 260 (White, J., concurring), 260 (O'Connor, J., concurring). *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), held that a Title VII plaintiff is not required to prove by direct evidence that a discriminatory purpose was a motivating factor behind a disputed employment action.[25] In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-17 (1993), the Court concluded that direct evidence of discrimination is not required to support a finding that a violation of the ADEA was willful. See 29 U.S.C. § 626(b).

---

[25] The decision in *Desert Palace* rested in part on the language of the 1991 Civil Rights Act. 539 U.S. at 98-99. But, as we explain below, much of the reasoning in *Desert Palace* applied more broadly.

Those decisions establish that, where the text of the relevant statute does not specifically impose any elevated evidentiary requirement on a party in civil litigation, the courts themselves will not do so. The absence of any direct evidence requirement in the text of the ADEA is thus dispositive in the instant case.

The linchpin of this aspect of the decisions in both *Price Waterhouse* and *Desert Palace* was that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253; *Desert Palace*, 539 U.S. at 99. Where there is no contrary statutory direction, those conventional rules ordinarily govern the quantum of proof which a party must adduce in civil litigation.

> Exceptions to this [preponderance of the evidence] standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action – action more dramatic than entering an award of money damages or other conventional relief – against an individual.

Price Waterhouse, 490 U.S. at 252 (plurality opinion).

The conventional rule applied in *Price Waterhouse* was that "parties to civil litigation need only prove their case by a preponderance of the evidence." 490 U.S. at 253. The rule invoked by the Court in *Desert Palace* was that a plaintiff is not required to adduce direct evidence.

> [A] plaintiff [may] prove his case "by a preponderance of the evidence," [*Price Waterhouse*, 490 U.S. at 253], using "direct or circumstantial evidence." *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

539 U.S. at 99.

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." *Id.* at 147 (emphasis added).

539 U.S. at 100. The claim in *Reeves*, as in the instant case, arose under the ADEA.

> The reason for treating circumstantial and direct evidence alike is both clear and deep rooted. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957).
>
> The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction,

> even though proof beyond a reasonable doubt is required....

539 U.S. at 100.[26]

For many years the idea that direct evidence must be adduced to prove a disputed fact has been anathema to the law. Over a century ago this Court rejected a suggestion that such a fact could only be demonstrated by direct evidence.

> [W]e are not aware of any rule of law which requires any particular method of proving such a fact, differing from that required to prove any similar fact. Whatever naturally and logically tends to establish it is competent evidence.

Standard Oil Co. v. Van Etten, 107 U.S. 325, 332 (1882). Countless federal and state juries have been instructed, as was the jury in the instant case, to draw no distinction between direct and circumstantial evidence. See *Desert Palace*, 539 U.S. at 100. The Eighth Circuit itself has repeatedly recognized that in criminal cases "circumstantial evidence is as intrinsically probative as direct evidence," *U.S. v. Bradley*,

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[26] The Eighth Circuit acknowledged that "some of the analysis in *Desert Palace* may seem inconsistent with" the direct evidence requirement in Justice O'Connor's opinion in *Price Waterhouse*. (Pet. App. 11a).

473 F.3d 866, 867 (8th Cir. 2007),[27] and "may be the sole support for a conviction." *U.S. v. Posters N Things, Ltd.*, 969 F.2d 652, 662 (8th Cir. 1992).

This Court has repeatedly emphasized that direct (as opposed to circumstantial) evidence is *not* required to prove the existence of a discriminatory or otherwise improper motive. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 717 (1983); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). That longstanding rule applies whenever a plaintiff seeks to show the existence of an impermissible motivating factor, regardless of whether that showing once made is relied on to establish the existence of an unlawful purpose, or to place on the defendant the burden of demonstrating that it would have taken the same action even in the absence of discrimination.

Congress legislates against this background of established rules of civil litigation. When Congress wishes to impose a higher standard of proof, it is free to do so; absent such legislative direction, however, Congress can be presumed to have intended the conventional rules will apply. Thus in *Desert Palace*

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[27] See *U.S. v. Maxwell*, 498 F.3d 799, 801 (8th Cir. 2007); *U.S. v. Opare-Addo*, 486 F.3d 414, 416 (8th Cir. 2007); *United States v. Jackson*, 365 F.3d 649, 655 (8th Cir. 2004); *U.S. v. Gipp*, 147 F.3d 680, 689 (8th Cir. 1998); *U.S. v. Wilcox*, 50 F.3d 600, 602-03 (8th Cir. 1995); *U.S. v. Jones*, 16 F.3d 275, 279 (8th Cir. 1994).

the Court reasoned that if Congress had wanted to impose a direct evidence requirement on plaintiffs, it

> could have made that intent clear by including language to that effect in [Title VII]. Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances.... See, *e.g.*, 8 U.S.C. § 1158(a)(2)(B) (stating that an asylum application may not be filed unless an alien "demonstrates by clear and convincing evidence" that the application was filed within one year of the alien's arrival in the United States); 42 U.S.C. §5851(b)(3)(D) (providing that "[r]elief may not be ordered" against an employer in retaliation cases involving whistleblowers under the Atomic Energy Act where the employer is able to "*demonstrat[e] by clear and convincing evidence* that it would have taken the same unfavorable personnel action in the absence of such behavior" (emphasis added)); cf. *Price Waterhouse*, 490 U.S. at 253 (plurality opinion) ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief").

Desert Palace, 539 U.S. at 99 (emphasis in original).

> Title VII's silence with respect to the type of evidence required in mixed-motive cases... suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally applies in Title VII cases." [*Price*

Waterhouse, 490 U.S. at 253 (plurality opinion)].

539 U.S. at 99.

Some Eighth Circuit decisions require as a precondition of a *Mt. Healthy* mixed motive instruction (and define as direct evidence) proof which is "strong" or "clear." See pp. 36-37, *infra*. But Congress has adopted ninety-four statutes requiring, in other contexts, that a particular showing be made by "clear and convincing evidence." Other such statutes require that evidence be "clear," "unmistakable," "unequivocal," "compelling," or "conclusiv[e]."[28] The failure of Congress to include any such language in the ADEA was assuredly deliberate.

Other Eighth Circuit decisions demand (and define as direct evidence) proof of a very specific (and uncommon) type of discriminatory remark. See pp. 37-42, *infra*. Congress has been extremely reluctant to incorporate that sort of specialized evidence requirement into federal law, presumably recognizing that limiting a litigant in that way would often impose an impossible burden. There appear to be only a handful of federal laws with this sort of requirement, all of which insist upon certain types of written evidence.[29] For example, 3 U.S.C. § 20 provides that

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[28] A list of those statutes is set out in an appendix to this brief.

[29] See 7 U.S.C. § 2009h ("evidence [of community support for a project] shall be in the form of a certification of support for

(Continued on following page)

> [t]he only evidence of a refusal to accept, or of a resignation of the office of President or Vice President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

Where Congress has concluded that such special evidence requirements should be limited to a literal handful of rarely applied statutes, it would be manifestly inappropriate for the courts to import just such requirements into other laws and then apply them – as has the Eighth Circuit – in a large number of cases.

Yet a third line of Eighth Circuit cases requires (and defines as direct evidence) non-circumstantial evidence. (See pp. 34-36, *supra*). No provision in the United States Code requires a party – even the United States in a capital case – to prove any fact by that sort of direct evidence; every reference to circumstantial evidence in the United States Code

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the project from each affected general purpose local government"), 12 U.S.C. § 2503 (where records do not reveal where money order or traveler's check was purchased, bank which issued it may escheat the funds under the laws of the state in which the bank has its principal place of business "until another State shall demonstrate by written evidence that it is the State of purchase"), 31 U.S.C. § 1501(a) ("[a]n amount shall be recorded as an obligation of the United States Government only when supported by [certain specified] documentary evidence").

expressly permits its use.[30] It would be unwise for the courts to engraft onto any federal statute an evidentiary requirement that Congress itself has never thought appropriate in any context.

The pattern of federal legislation in this area makes clear the willingness of Congress to expressly so provide when it wishes to require certain types of evidence, or to establish some elevated standard of proof. As this Court noted in *Desert Palace*,

> [i]t is not surprising, therefore, that neither petitioner nor its *amici curiae* can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.

539 U.S. at 100. In this context, the terms of the ADEA – or, more precisely, the lack of any such "affirmative directive in [the] statute" – is dispositive. The ADEA does not require a plaintiff (or the defendant) to establish anything by direct evidence, does not bar even exclusive reliance on non-direct evidence, and does not insist on proof by clear and convincing evidence.

In *Hazen Paper Co. v. Biggins* this Court rejected an Eighth Circuit requirement that a plaintiff adduce direct evidence in order to establish that a violation of

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[30] 5 U.S.C. § 1221(e)(1); 21 U.S.C. § 863(e)(6); 22 U.S.C. § 1319(c)(3)(B)(II); 42 U.S.C. §§ 6928(f)(2)(B), 7413(c)(5)(B).

the ADEA was willful. 507 U.S. at 616 (citing *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989)). Under the ADEA plaintiffs are entitled to liquidated damages for willful violations, which this Court had earlier held requires a showing that an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985). The Eighth Circuit in *Neufeld* had concluded that an additional direct evidence requirement was desirable to limit the number of ADEA cases which would otherwise be willful. 884 F.2d at 340. This Court refused to engraft such a requirement into the statute. "Once a 'willful' violation has been shown, the employee need not additionally...provide direct evidence of the employer's motivation." 507 U.S. at 617.

Colorable policy arguments could perhaps be fashioned for departing in this case from the conventional rules of litigation, and imposing on plaintiffs some elevated standard of proof when they seek a *Mt. Healthy* mixed motive instruction. The court of appeals may have believed that it would be best to limit the number of cases in which such an instruction can be given, and might have concluded that adopting a special standard of proof would be an effective way to impose such a limitation. But that simply was not the choice that Congress made when it wrote the statute.

II. THE IMPOSITION OF ELEVATED EVIDENTIARY REQUIREMENTS SHOULD BE MADE BY CONGRESS

The conventional rules of civil litigation derive from a substantial body of judicial experience over a long period of time and a wide range of civil claims. Those rules represent an intensely practical set of conclusions regarding the standards that most effectively further the search for truth and assure fairness to the parties. A particular virtue of these rules is that they are the same for all claims and all claimants; we do not, for example, have different hearsay rules for contract, tort, and claims in equity. Such circumstance-specific variations would force the courts to revisit endlessly the otherwise established and predictable standards.

Congress, of course, can and does depart from those standards in framing particular statutes. It may choose to do so out of solicitude for certain potential plaintiffs or defendants, a desire to facilitate enforcement of laws of especial importance, or a concern to temper application of statutes of particular burdensomeness. Where Congress decides to fashion some statute-specific evidentiary standard, it can frame any number of distinctive statutory measures. But the fashioning of such alternatives, like the decision to depart at all from the conventional rules of litigation, turns on the types of policy choices that fall within the unique province of the legislative branch.

A. Congress Should Determine When The Conventional Standards of Proof Should Be Modified

If the courts are to undertake to decide on their own when to put aside the conventional standards of civil litigation, they will need a clear and predictable rule as to when they should do so. Were the Court, for example, to require plaintiffs in the instant type of situation to adduce direct evidence, it would be necessary to establish some guideline for the lower courts to use in the future to select, from among the vast array of statutes and issues that come before them, those which should and should not continue to be governed by the usual standards.

If in the instant case direct evidence (however defined) is required to obtain a *Mt. Healthy* instruction under the ADEA, the lower courts would have to decide in the years ahead whether to apply that (or some other) non-traditional standard to each of the other federal laws (including, but certainly not limited to, anti-discrimination laws) in which liability is imposed for actions taken for a particular impermissible purpose. Under any of those laws, where the plaintiff establishes the existence of an impermissible motivating factor, a defendant could insist that the plaintiff adduce direct evidence (or some other special type of proof) in order to obtain a *Mt. Healthy* instruction.

Not even the Eighth Circuit suggests that a direct evidence requirement should be used in all of these cases. To the contrary, the Eighth Circuit itself

does not impose a direct evidence requirement in First Amendment cases,[31] and does not require direct evidence in National Labor Relations Act cases. *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244-45 (8th Cir. 1996); see *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983).[32] But nothing in the text of the NLRA, Title VII, the ADEA, or any of the other statutes under which this issue could arise provides any basis for deciding – if the

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[31] *Davison v. City of Minneapolis, Minnesota*, 490 F.3d 648, 655 n.5 (8th Cir. 2007).

[32] Motivation is a question of fact that may be inferred from both direct and circumstantial evidence.... Once the general counsel has established that the employees' union activity was a motivating factor in the discharge, the burden shifts to the employer to demonstrate that he would have taken the same action even in the absence of protected activities.

101 F.3d at 1244-45 (8th Cir. 1996). In *NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (8th Cir. 1993), the Eighth Circuit applied the rule in *Transportation Management* to a case in which the finding of an impermissible motivating factor was based on a determination that the employer's proffered explanations "smack of pretext." In applying that principle in *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (8th Cir. 1993), the Eighth Circuit held that in deciding whether there was an impermissible motivating purpose, "the Board is free to draw reasonable inferences from both direct and circumstantial evidence, because the employer's intent will rarely be proven by direct evidence alone." 989 F.2d at 1508.

See *St. Lukes Episcopal-Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001); *NLRB v. MDI Commercial Services*, 175 F.3d 621, 625 and n.2 (8th Cir. 1999) ("proof that the employer would have taken the same action in any event is an affirmative defense").

courts undertake to decide – when a direct evidence rule should and should not be applied.

If the courts are now to pick and choose when to depart from conventional standards of proof, there is no obvious reason why that should be limited to disputes involving multiple motives. There is nothing so unique about the situation in this case that would readily distinguish it from every other statute and issue in which a party might ask for a departure from the conventional rules of litigation.

Defendants understandably would prefer never to bear the burden of proof regarding what would have occurred in the absence of discrimination, but if the inconvenience of meeting that burden is sufficient to warrant departing from the usual standards of proof, there are assuredly claims and remedies which impose significantly greater burdens on defendants, and which might give rise to yet more requests for imposing elevated burdens on plaintiffs. Defendants could argue that particular types of claims (ADEA disparate impact claims, perhaps) or certain forms of relief (e.g. punitive or liquidated damages) must be supported by direct evidence, or eyewitnesses, or documentary proof. Plaintiffs, on the other hand, could argue (like the plaintiff in *Price Waterhouse*) that where federal law recognizes an affirmative defense – thus denying relief that would otherwise be required – defendants should be required to establish those defenses by clear and convincing evidence. Under the ADEA, for example, an employer which has used age as a criterion for an employment

decision can avoid liability if age is a BFOQ, 29 U.S.C. § 623(f)(1), or if reliance on that criterion was mandated by the laws of the country in which the workplace was located. *Ibid.*

Unless the Court continues to insist, as it did in *Desert Palace*, that requests for a departure from the conventional evidentiary standards be addressed to Congress, any litigant might reasonably contend that its opponent should be subject to some special more stringent standard. Absent any obvious and clear limiting principle, those demands could rapidly undermine the stability of the law that has until now served the courts, and litigants, so well.

B. Congress Should Determine What Evidentiary Standard Should Be Substituted for the Conventional Standards

In addition to having to decide *when* to depart from the usual evidentiary standards, the courts which opted to do so would in each instance have to decide *what* the alternative standard would be, framing some new rule of their own. The courts might choose among any of the various special statutory standards, selecting for example a requirement that proof be clear, clear and convincing, unmistakable, or unequivocal. But there is no reason why a judicially created standard would have to be chosen from among such existing provisions; the courts could fashion any number of entirely novel evidentiary requirements.

The history of the direct evidence requirement clearly illustrates the problems that arise when judicial creativity is unleashed in this manner. In the wake of *Price Waterhouse*, some lower courts mistakenly concluded that Justice O'Connor's concurring opinion was the controlling opinion, and therefore attempted to devise some ad hoc definition of "direct evidence." "Direct evidence" became a phrase in search of a meaning, and the search did not go well. That nearly twenty-year effort was untethered to the language or legislative history of the anti-discrimination laws at issue and unguided by any meaningful precedent or legal history. The results have been conflicting, inconsistent, and often essentially unexplained.

The effort to fashion a plausible definition of "direct evidence" foundered in part because there is no established body of caselaw on which the lower courts could rely. Before *Price Waterhouse* the definition of "direct evidence" was unimportant because the law attached no significance whatever to whether evidence is or is not "direct." Whether or not the testimony of a witness constitutes direct evidence is as irrelevant as whether the witness testified before or after lunch. Juries have widely been instructed that they are to attach no significance to whether evidence is "direct." *Desert Palace*, 539 U.S. at 100. In the instant case the trial judge, without objection,

gave just such an instruction.[33] Because it was long of no consequence whether evidence was direct or non-direct, until recently no body of law was fashioned regarding what would constitute such not-essential direct evidence.

Justice O'Connor's concurring opinion in *Price Waterhouse* set a number of lower courts on the vexing task of devising some definition of "direct evidence." In *Price Waterhouse* Justice Kennedy correctly anticipated that the application of a "direct evidence" requirement would lead to substantial difficulties.

> Courts will...be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence.... [A]...burden-shifting mechanism, the application of which itself depends on...whether evidence is sufficiently direct...is not likely to lend clarity to the process.

490 U.S. at 291.

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[33] At the outset of the trial the judge had instructed the jury, without objection from either party,

> some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you are not to be concerned with those terms since the law makes no distinction between the weight to be given direct and circumstantial evidence.

(Tr. 25).

The problem which Justice Kennedy foresaw quickly came to pass. The Second Circuit observed only a few years after the decision in *Price Waterhouse* that "the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). In 1999 the First Circuit offered a detailed analysis of the various approaches, observing that "generally speaking, three schools of thought have emerged." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir. 1999). In 2002 the Ninth Circuit described in stark terms the "chaos" and "morass" that resulted from the efforts of the lower courts to "convert[] Justice O'Connor's reference [to direct evidence] into a legal standard."

> The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence.

Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002). In its 2003 brief in *Desert Palace*, the United States noted that "the courts of appeals...have

struggled to define the contours of [the] direct evidence requirement."[34] The employer in *Desert Palace* observed that "[t]he circuit courts...have defined direct evidence in different ways, causing confusion in application."[35]

In the absence of any textual basis for a "direct evidence" requirement, the Eighth Circuit alone has fashioned and applied three distinct "direct evidence" standards. First, one line of decisions in the Eighth Circuit[36] defines "direct evidence" as the converse of circumstantial evidence.[37]

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[34] Brief for the United States as Amicus Curiae, No. 02-679, at 24.

[35] Brief for Petitioner, No. 02-679, at 9.

[36] This does not appear to be the prevailing definition of direct evidence in the Eighth Circuit in the last few years. See *Libel v. Adventurelands of America, Inc.*, 482 F.3d 1028, 1034 (8th Cir. 2007).

[37] *Mayer v. Nextel West Corp.*, 318 F.3d 803, 806 (8th Cir. 2003) ("[b]ecause Mayer presented no direct evidence of intentional age discrimination, but rather based his claim solely on circumstantial evidence, we apply the well-known *McDonnell Douglas* analytical framework"); *Day v. Johnson*, 119 F.3d 650, 654 (8th Cir. 1997) ("[b]ecause [plaintiffs] produced no direct evidence of discriminatory intent, we must decide whether they introduced sufficient circumstantial evidence"); *Kneibert v. Thomson Newspapers, Michigan Inc.*, 129 F.3d 444, 451 (8th Cir. 1997) ("Two methods exist by which a plaintiff can attempt to prove intentional discrimination. First, the plaintiff may present direct evidence of employment discrimination.... Second, the plaintiff can...satisfy his burden of proof using circumstantial evidence."); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1331-32 (8th Cir. 1996) ("There are two methods by which a

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> The term "direct evidence"...is simply evidence, which if believed, proves the existence of a fact in issue without inference or presumption.... The term "circumstantial evidence," on the other hand, is..."[e]vidence based on inference...." *Black's Law Dictionary* 595 (8th ed. 2004).

Bakhtiari v. Lutz, 507 F.3d 1132, 1137 n.3 (8th Cir. 2007). That is the definition of direct evidence which respondent advanced in the courts below.[38] Several other courts of appeals also define "direct evidence" as "evidence that proves the existence of a fact without requiring any inferences." *Grizell v. City of Columbus Division of Police*, 461 F.3d 711, 719 (6th Cir. 2006).[39]

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plaintiff can attempt to prove intentional discrimination. First, a plaintiff may satisfy his burden by presenting direct evidence of discrimination.... [T]he Supreme Court has developed a second, indirect method of proof by which a plaintiff can satisfy his burden using circumstantial evidence.").

[38] Appellant's Brief, Nos. 07-1490 and 01-1492 (8th Cir.), 30 ("The framework for evaluating an age discrimination claim is dependent [on] whether the type of evidence presented in support of the claim is direct or circumstantial."), 32 ("Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law.").

[39] Essentially the same definition of "direct evidence" is set out in *Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 858 (7th Cir. 2008), *Sanders v. Southwestern Bell Telephone, L.P.*, 544 F.3d 1101, 1105 (10th Cir. 2008), and *Rojas v. Florida*, 285 F.3d 1339, 1342 n.5 (11th Cir. 2002).

This definition would require proof of a facially discriminatory directive, such as "fire everyone over 40." Testimony about an express statement of an intent to discriminate, even if uttered at the moment of the decision or action in question, would not be direct evidence in this sense, because the trier of fact would have to infer that the speaker was truthfully describing his or her motives.[40] Cases involving either type of exceptional evidence are particularly rare, because employers generally know better than to "announce that they are acting on prohibited grounds." *Erwin v. Potter*, 79 Fed.Appx. 893, 896 (6th Cir. 2003).

Second, a number of Eighth Circuit decisions hold that "'direct' refers to the causal strength of the proof" and is satisfied only by "*strong*...evidence that illegal discrimination motivated the employer's adverse action." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (emphasis added); see

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[40] See *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992):

> Even a highly probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision.

958 F.2d at 1185.

The official who made the statement might have been trying to cover up some even more improper purpose, such as the refusal of the employee to pay a bribe to get the job, or might have made the remark in a spiteful attempt to cause the employer legal difficulties.

King v. Hardesty, 517 F.3d 1049, 1057 (8th Cir. 2008) (equating "direct evidence" with "evidence that *clearly* points to the presence of an illegal motive") (emphasis added).[41] This definition of "direct evidence" is similar to, although perhaps more stringent than, a requirement of proof by clear and convincing evidence.[42]

A third line of Eighth Circuit cases requires a very specific and uncommon type of circumstantial evidence.

> "Direct evidence"...is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision...."

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[41] See *Shaffer v. Potter*, 499 F.3d 900, 904 (8th Cir. 2007) ("clearly points"); *Gammon v. Flowers*, 211 Fed.Appx. 523, 524 (8th Cir. 2006) ("strong"); *Lewis v. St. Cloud University*, 467 F.3d 1133, 1135 (8th Cir. 2006) ("strong"); *EEOC v. Trans States Airlines, Inc.*, 462 F.3d 987, 992 (8th Cir. 2006) ("strong evidence"); *Arraleh v. County of Ramsey*, 461 F.3d 967, 974 (8th Cir. 2006) ("clearly points"); *Torlowei v. Target*, 401 F.3d 933, 934 (8th Cir. 2005) ("strong").

[42] The Second Circuit has similarly held that "to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment." *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 174 (2d Cir. 2006) (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997)). The most recent Second Circuit decisions hold that only a "smoking gun" will suffice. *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008) ("Direct evidence of discrimination, 'a smoking gun,' is typically unavailable"); *Beauchat v. Mineta*, 257 Fed.Appx. 463, 463 (2d Cir. 2007) (plaintiff's evidence was "not the type of direct evidence or 'smoking gun' needed to establish gender or race discrimination via *Price-Waterhouse* mixed-motive analysis").

> ...It does not extend to..."statements by non-decisionmakers," or "statements by decision-makers unrelated to the decisional process itself."

(Pet. App. 5a) (quoting *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)), and *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring)). In practice this line of Eighth Circuit decisions categorizes only two uncommon types of circumstantial evidence as "direct evidence." First, a statement by an individual involved in the decisionmaking process is direct evidence if that statement both indicates a bias against the group of which the plaintiff is a member and was uttered at about the point in time when the decision in question was made.[43] The temporal limitation is a narrow one; biased remarks made four or five months[44] prior to the decision are deemed too remote in time to constitute direct evidence. Second, a statement by an individual involved in the decisionmaking process is direct evidence, regardless of when made, if that statement

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[43] E.g., *Roberts v. Park Nicollet Health Services*, 528 F.3d 1123, 1128 (8th Cir. 2008) (statements made on the day the plaintiff was fired and two days earlier).

[44] *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1153 (8th Cir. 2007) ("[t]he comments were not related to the decisional process as the most recent occurred at least four months before [the plaintiff's] termination and both were made to employees not involved in the decisional process."); *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 609 (8th Cir. 2006) (five months too remote in time).

specifically questions the work competence or fitness of the group of which the plaintiff is a member.[45] Statements in either category are only direct evidence if their discriminatory meaning is unequivocal.[46]

On the other hand, statements by a decision-maker of even virulent (but not job-specific) animus on the basis of race, gender, age, or other protected

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[45] E.g., *King v. Hardesty*, 517 F.3d 1049, 1058-59 (8th Cir. 2008) ("white people teach black kids...better than someone from their own race"); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 642 (8th Cir. 2002) ("derogatory comments about the workplace capabilities of women and non-Hispanics").

[46] In *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, one of the decisionmakers had earlier remarked that he wanted to hire "a bunch of young...and full of cum guys," and that he "intended to hire 'young studs' to replace the older sales people." 507 F.3d at 1152. This was held not to constitute direct evidence supporting the plaintiff's ADEA claim because "an inference is required to connect the statements to [the plaintiff], as they do not mention him or indicate that [the official quoted] considered him 'older.'" 507 F.3d at 1153.

In *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934, the Eighth Circuit held that a statement by a white official to a black worker that "you don't know your place," although made by a supervisor who had made other racial remarks, was not direct evidence because the statement was "facially race-neutral," and would require an "extrapolat[ion of] racial animus."

In *E.W. Blanch Co., Inc. v. Enan*, 124 F.3d 965 (8th Cir. 1997), the plaintiff alleged that he had been denied a position on the board of directors because of his age. Mr. Blanch (apparently the principal of the firm) commented that one of the individuals who was selected "is the right age." 124 F.3d at 970. The court found this insufficient because the comment "made no direct reference to Mr. Enan's age." *Id.*

characteristic do not constitute direct evidence (in this third sense) if they are not made in connection with the decisional process itself.[47] Statements by

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[47] In *Twymon v. Wells Fargo Co.*, 462 F.3d 925 (8th Cir. 2006), one of the white officials involved in the dismissal of the black plaintiff had earlier made a series of remarks which the court of appeals acknowledged were "racially offensive." 462 F.3d at 934.

> Twymon alleges that...Hall explained to her that "intelligence and outspokenness in black employees is not welcomed" and that "qualities that would make a Caucasian a golden child, being aggressive and intelligent and outspoken and a go-getter, would do exactly the reverse to a person of color." Twymon alleges that Hall advised her to develop a deferential persona, as "a good black" that "would be accepted by the Caucasians at Wells Fargo,".... Twymon alleges she responded by asking if she should "act[ ] like an Uncle Tom" and states that Hall replied in the affirmative.

462 F.3d at 931. Another decisionmaker commented that "she didn't see any problem" when Twymon objected that co-workers had criticized her for dating white men. *Id.* The court of appeals held that this was not "direct evidence" because "none of the statements...were related to the decisional process." 462 F.3d at 934.

In *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006), the black plaintiff's white supervisor referred to the plaintiff as a "lawn jockey," remarked that all African-Americans look alike, stated that the plaintiff's "skin color seemed to wipe off onto towels," and asked "What's up, my nigga?" 440 F.3d at 1033. The court of appeals held that this was not direct evidence, explaining that the "comments are best classified as, 'statements by a decisionmaker unrelated to the decisional process.'" 440 F.3d at 1034 (quoting *Simmons v. Oce-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999)).

In *Simmons v. Oce-USA, Inc.*, 174 F.3d 913 (8th Cir. 1999), the supervisor whose evaluations had led to the dismissal of the

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individuals not involved in the decisionmaking process are never direct evidence, even though they may reveal a corporate culture in which biased remarks or actions are openly tolerated.[48] Circumstantial

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black plaintiff had referred to him as "Buckwheat" and told a joke about the sexual organs of African-Americans. 174 F.3d at 915. The court of appeals recognized that the first remark was "a racial slur when it is directed towards a black employee," but held that these statements were not direct evidence but merely "statement[s] by [a] decisionmaker[ ] unrelated to the decisional process." 174 F.3d at 916 (quoting *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616, 619 (8th Cir. 1998)).

In *Yates v. Douglas*, 255 F.3d 546 (8th Cir. 2001), a supervisor "had used the word 'nigger' to describe black people, and...used similarly offensive language in direct reference to [the plaintiff]." 255 F.3d at 548. The court of appeals held that these statements were not direct evidence, but were "best classified as statements by a decisionmaker unrelated to the decisional process." 255 F.3d at 549.

In *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616 (8th Cir. 1998), the decisionmaker had commented that "too many African-Americans were moving into [the city where the office was located]." 133 F.3d at 618. The court of appeals held that this was not direct evidence because it "had no relation to [the plaintiff's] employment status or to the conduct of the Center's business." 133 F.3d at 619.

In *Philipp v. ANR Freight System, Inc.*, 61 F.3d 669 (8th Cir. 1995), one decisionmaker had "referred to [the plaintiff] on occasion as 'the old man.'" 61 F.3d at 674. The court of appeals held that that was not direct evidence because there was no "evidence showing a 'specific link between discriminatory animus and the challenged decision.'" *Id.* (quoting *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 996 F.2d 200, 201 n.1 (8th Cir. 1993)).

[48] E.g., *Carraher v. Target Corp.*, 503 F.3d 714, 718 (8th Cir. 2007) (statement by human resources manager that "[o]lder,

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evidence other than express statements by persons involved in the decisionmaking process, such as proof that "discriminatory attitudes were prevalent," does not constitute direct evidence. *Philipp v. ANR Freight System, Inc.*, 61 F.3d 669, 674 (8th Cir. 1995).

In the instant case, of course, it would be possible for the Court to resolve this problem by picking any one of these definitions, or perhaps fashioning (as so many lower courts have) some entirely new definition of "direct evidence." But it manifestly would be impracticable to mandate use of that particular standard for *all* cases and issues in which conventional evidentiary requirements are not to be utilized. Rather, the Court would have to frame some general guideline, applicable to a wide range of issues that arise in civil cases, that the lower courts could in the future apply in deciding how to fashion a non-traditional evidentiary standard whenever they decide to depart from the conventional standards.

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more experienced candidates do not have fire in the belly."); *Libel v. Adventurelands of America, Inc.*, 482 F.3d 1028 (8th Cir. 2007) (statement made by the CEO of the employer who was also the father of the official who dismissed the plaintiff); *Rivers-Frison v. Southeast Mo. Community Treatment Ctr.*, 133 F.3d 616, 618-19 (8th Cir. 1998) (racial remarks made by the human resources coordinator in the presence of the decisionmaker).

III. SPECIAL EVIDENTIARY STANDARDS WOULD IMPEDE ENFORCEMENT OF THE ADEA

This case concerns the principle, first articulated in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274 (1977), that where a plaintiff establishes that an impermissible purpose was a motivating factor in an adverse decision, the defendant must "show[ ] by a preponderance of the evidence that it would have reached the same decision even in the absence [of the impermissible purpose]." 429 U.S. at 287. Neither the Eighth Circuit nor any other court of appeals has suggested that the *Mt. Healthy* principle should never be applied to ADEA cases.

The Eighth Circuit, however, has created an exception to the *Mt. Healthy* principle – excluding cases in which a plaintiff lacks direct evidence – that would simply swallow the rule itself. All thirteen courts of appeals have agreed that direct evidence is only rarely available.[49] The Eighth Circuit has

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[49] *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare"); *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008) ("[d]irect evidence of discrimination, 'a smoking gun,' is typically unavailable"); *Dillon v. Coles*, 746 F.2d 998, 1002-03 (3d Cir. 1984) ("in most employment discrimination cases direct evidence of the employer's motivation is unavailable or difficult to acquire"); *Spain v. Mecklenburg County School Bd.*, 54 Fed.Appx. 129, 132-33 (4th Cir. 2002) ("it is often difficult for a

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repeatedly acknowledged that the requisite "direct evidence of discriminatory intent is rare." *Marzec v.*

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plaintiff to provide direct evidence of discriminatory intent"); *Portis v. First Nat'l Bank*, 34 F.3d 325, 328 (5th Cir. 1994) ("direct evidence is rare"); *Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) ("direct evidence is rare in discrimination cases"); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir. 1983) ("the plaintiff frequently finds it an impossible or most difficult task to produce direct evidence of an employer's intent to discriminate"); *Erwin v. Potter*, 79 Fed.Appx. 893, 896 (6th Cir. 2003) ("[d]irect evidence of discrimination is rare because employers generally do not announce that they are acting on prohibited grounds"); *Amrhein v. Health Care Service Corp.*, 546 F.3d 854, 858 (7th Cir. 2008) ("direct evidence of discriminatory intent is rare"); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662 (9th Cir. 2002) ("[p]articularly because employers now know better, direct evidence of employment discrimination is rare"); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1117 (10th Cir. 2004) ("direct evidence of discriminatory intent or purpose usually is unavailable"); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1191 (11th Cir. 1997) ("[it] is...the rare case where there is direct evidence of retaliatory motive"); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1375 (11th Cir. 1996) ("direct evidence of discrimination can be difficult to produce"); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987) ("[i]t is rare that direct evidence of discrimination exists"); *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) ("direct evidence of intentional discrimination is hard to come by") (quoting *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring)); *Crawford-El v. Britton*, 93 F.3d 813, 833 (D.C. Cir. 1996) ("direct evidence of an unconstitutional motive for an ostensible legal act is virtually never available") (en banc) (Silberman, J., concurring); *Haddon v. Executive Residence at the White House*, 313 F.3d 1352, 1358 (Fed. Cir. 2002) ("direct evidence is rarely available in retaliation cases").

Marsh, 990 F.2d 393, 395 (8th Cir. 1993);[50] see *Price Waterhouse*, 490 U.S. at 271 ("direct evidence of intentional discrimination is hard to come by") (O'Connor, J., concurring).

> As the intent is the design, purpose, resolve, or determination in the mind of the [defendant], it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by proof.

Bailey v. Alabama, 219 U.S. 219, 233 (1911).

The definition of direct evidence applied by the court below excludes virtually all of the types of circumstantial evidence which this Court has recognized can be probative of a discriminatory intent. *Sprint v. Mendelsohn*, 128 S.Ct. 1140, 1143 (2008) (discriminatory acts and statements by supervisors not involved in decisionmaking process); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (biased remarks made outside the context of disputed decision; denial

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[50] *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1117 (8th Cir. 2006) ("direct evidence of intent is often difficult or impossible to obtain"); *EEOC v. Liberal R-II School Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) ("direct evidence of discrimination is rare"); *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 364 (8th Cir. 1994) ("it may be difficult to prove an employment discrimination case by direct evidence"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1108 (8th Cir. 1994) ("[i]t is axiomatic that employment discrimination need not be proved by direct evidence, and indeed, that doing so is often impossible....").

of promotion to better qualified minority applicant); *Reeves*, 530 U.S. at 147-48 (falsity of employer's explanation), 151 (more favorable treatment of similarly situated younger worker), 152 (changing explanation by defendant); *Anderson v. City of Bessemer City*, 470 U.S. 564, 576-77 (1985) (differing treatment of male and female applicants during interview process); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.2 (1983) (denial of promotion to better qualified minority applicant; "derogatory remarks about blacks in general and the plaintiff in particular"); *Rogers v. Lodge*, 458 U.S. 613, 622-28 (1982) (disparate impact of decision on racial minorities); *Teamsters v. United States*, 431 U.S. 324, 337-38, 339, 342 n.23 (statistics), 339 (inaccurate statements to minority applicants) (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262-68 (1977) (history of discrimination, timing of disputed action, departure from usual procedures or substantive standards); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (statistics, general policy and practice with respect to minority employment, dissimilar treatment of other worker who engaged in misconduct "of comparable seriousness"). If the *Mt. Healthy* principle were applicable only in the handful of exceptional cases in which a plaintiff could prove discrimination without resort to any of these types of evidence, the principle itself would be largely meaningless.

The *Mt. Healthy* principle is essential to the enforceability of statutory and constitutional commands – in this case the ADEA prohibition against age-based discrimination – forbidding action based on an impermissible motive. The allocation of the burden of proof is outcome determinative in those cases in which a material issue is sufficiently uncertain that the trier of fact cannot determine the answer one way or the other. That problem of uncertainty is particularly likely to arise with regard to the problem addressed in *Mt. Healthy* and its progeny. Because it will often be difficult to determine what an employer would have done had it not considered an unlawful criterion, placing that burden on a plaintiff would seriously impede enforcement of a prohibition against discrimination.

What an employer would have done in that situation is not a fact, but merely "a hypothetical construct." *Price Waterhouse*, 490 U.S. at 240 (plurality opinion). Because it is highly unlikely that a defendant will admit that age was a motivating factor, there will rarely if ever be a witness who will testify in so many words about – or be subject to cross-examination regarding – what the employer would have done in the absence of discrimination. Often employers have no clearly established and rigid rules governing employment decisions, or even consistently applied practices, to which a plaintiff could point to meet this burden. If the plaintiff bore the burden of proof, a defendant often could add substantially to that burden by offering a welter of justifications for its actions, in the hope that the jury

would find at least one of the proffered explanations credible. Skilled defense counsel could combine uncertainty about an employer's standards with confusion about a multiplicity of justifications in a manner that would confound a jury's efforts to assess what a defendant would have done in the absence of discrimination.

The instant case well illustrates both the difficulty of determining what an employer would have done in the absence of discrimination and the importance of which party bears the burden of proof on that issue. FBL did not have any written guidelines governing the reallocation of personnel during the reorganization that led to Gross's demotion. Nor did FBL suggest it had any rule or practice governing the weight of the various criteria that it invoked to explain that demotion. FBL offered at least five different justifications for the decision to demote Gross. Gross in turn offered substantial evidence that each of those justifications was unworthy of credence. If as to even *one* of those proffered justifications the jury concluded that it was a phony explanation, the jury could have inferred (although it would not have been required to do so) that age was a motivating factor.[51]

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[51] A jury could conclude from the falsity of one proffered explanation that age was a motivating factor, even though the jury did not conclude that all of the explanations were false. That is precisely the sort of situation in which it matters which party bears the burden of proof regarding what an employer would have done in the absence of discrimination.

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> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992).

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

To go further and determine what the employer would have done in the absence of discrimination, the jury would have to decide how important the factor age was (perhaps based on the credibility of the defense witnesses, the flagrancy of the falsity of the discredited explanation, or the other evidence suggesting age bias) and how plausible and weighty the remaining explanations appeared to be. A reasonable jury might well have concluded that it was impossible

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> At the summary judgment stage, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was *a* motivating factor in the defendant's employment action. If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Therefore, evidence of additional motives, and the question whether the presence of mixed motives defeats all or some part of plaintiff's claim, are trial issue, not summary judgment issues.

Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004) (emphasis in original).

to say with any confidence what FBL would have done had age not been a motivating factor. Given the inherently speculative nature of this decision, it is entirely understandable that FBL's trial counsel – despite the instruction imposing this burden of proof on the defendant – made a tactical decision not to attempt to persuade the jury that FBL would have made the same decision in the absence of discrimination, and never challenged the sufficiency of the evidence to support the jury's rejection of that possible affirmative defense.

If, as will often be the case, it is not possible for the trier of fact to determine what would have occurred in the absence of discrimination, liability should be imposed on the employer.

> [T]he employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created...by his own wrongdoing.

Transportation Management, 462 U.S. at 403.

> While requiring that a plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action, "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to

> probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture...."

Price Waterhouse, 490 U.S. at 264 (O'Connor, J., concurring) (emphasis in original) (quoting Malone, Ruminations on Cause-In-Fact, 9 Stan.L.Rev. 60, 67 (1956)).

> [P]lacing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII.

490 U.S. at 273 (O'Connor, J., concurring); see *id.* at 261-62 (O'Connor, J., concurring) ("employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion.").

If the plaintiff bore the too often impossible burden of establishing what would have occurred in the absence of discrimination, the employer would avoid liability in a substantial number of cases in which the adverse action would not indeed have otherwise occurred. That would usually be the inevitable consequence of limiting application of the *Mt. Healthy* principle to those rare cases in which the plaintiff has direct evidence.

IV. A DIRECT EVIDENCE REQUIREMENT IS NOT SUPPORTED BY THIS COURT'S DECISION IN *PRICE WATERHOUSE*

The Eighth Circuit erred in assuming that "Justice O'Connor's opinion concurring in the judgment [in *Price Waterhouse*] is the controlling opinion that sets forth the governing rule of law." (Pet. App. 5a).[52]

In *Price Waterhouse* a majority of the Court applied the *Mt. Healthy* principle to claims under Title VII, and rejected a direct evidence requirement. Six members of the Court agreed that once the plaintiff has established that an impermissible consideration was a motivating factor, the defendant bears the burden of showing that it would have made the same decision in the absence of discrimination.[53] The plurality opinion, joined by four members of the Court, contained no direct evidence requirement; to the contrary, it emphasized

> we do not suggest a limitation on the possible ways of proving that stereotyping played

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[52] Pet. App. 11a ("[*Price Waterhouse*] was a fragmented decision from which our court adopted Justice O'Connor's concurring opinion as the controlling rule."); *Bakhtiari v. Lutz*, 507 F.3d 1132, 1135 n.3 (8th Cir. 2007) ("Justice O'Connor, in her controlling concurrence, stated...."); *Erickson v. Farmland Industries, Inc.*, 271 F.3d 719, 724 (8th Cir. 2001) ("According to Justice O'Connor's controlling opinion in *Price Waterhouse*....").

[53] 490 U.S. at 237-52 (plurality opinion), 258-59 (White, J., concurring), 261 (O'Connor, J., concurring).

> a motivating role in an employment decision....

490 U.S. at 251-52.[54] Justice White in a separate concurring opinion, also did not include any such direct evidence requirement; the standard endorsed by Justice White was that it was the plaintiff's "burden to show that the unlawful motive was a *substantial* factor in the adverse employment action." 490 U.S. at 259 (emphasis in original). Thus a total of five justices (the plurality together with Justice White) agreed on a standard that conspicuously did not include any requirement that direct evidence is needed to show that an impermissible consideration was a motivating factor.

In *Price Waterhouse* Justice O'Connor alone proposed that which party would bear the burden of proof would depend on whether the plaintiff had

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[54] 490 U.S. at 257:

> Price Waterhouse concedes that the proof in *[NLRB v.] Transportation Management*, [462 U.S. 393 (1983)] adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff....But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activities; there was, contrary to Price Waterhouse's suggestion, *no direct evidence* that that grudge had played a role in the decision.... If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

(Plurality opinion) (emphasis added).

direct evidence. 490 U.S. at 276. But Justice O'Connor's sixth vote was not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court.[55] The outcome in *Price Waterhouse* would have been the same even if Justice O'Connor had dissented.

Construed in the manner proposed by the Eighth Circuit, *Price Waterhouse* would have represented a surprising departure from the precedent from which it derived. In five decisions prior to *Price Waterhouse* this Court had held that where a plaintiff establishes that an impermissible purpose was a motivating factor behind an adverse action, the defendant bears the burden of showing that it would have made the same decision in the absence of that improper purpose. None of those prior decisions contained any direct evidence requirement. *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977) (First Amendment); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.21 (1977) (Equal Protection); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-03 (1983) (NLRA); *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (Equal Protection); *Board of*

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[55] *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992) ("[W]hat we must do is find common ground shared by five or more justices.... The requirement of 'direct evidence' was not...adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.").

County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674 (1996) (First Amendment).

V. THE DECISION OF THE COURT OF APPEALS IS BASED ON A MISUNDERSTANDING OF THE RELATIONSHIP BETWEEN *PRICE WATERHOUSE* AND *McDONNELL DOUGLAS*

The Eighth Circuit's direct evidence requirement is rooted in a fundamental misunderstanding of the relationship of the decisions in *Price Waterhouse*, and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The court below believed that *McDonnell Douglas* and *Price Waterhouse* represent two distinct methods for proving the existence of a discriminatory motive. Where a plaintiff lacks "direct evidence," the Eighth Circuit reasoned, *McDonnell Douglas* presents the "framework" for demonstrating the existence of an unlawful motive; if discrimination is proven under the *McDonnell Douglas* framework, that court asserted, the plaintiff bears the burden of proof as to whether the defendant would have made the same decision in the absence of discrimination. (Pet. App. 6a, 7a). On the other hand, the court below held, where a plaintiff does have direct evidence, the *Price Waterhouse* "framework" applies; if discrimination is proven under the *Price Waterhouse* framework, the defendant bears the burden of proof as to whether it would have made the same decision in the absence of

discrimination. (Pet. App. 6a, 8a). (Where the trier of fact concludes that a combination of both direct and circumstantial evidence is required to establish the existence of a discriminatory motive, it is unclear which "framework" the court of appeals would apply.)

McDonnell Douglas and *Price Waterhouse*, however, actually deal with distinct issues. *McDonnell Douglas* establishes a procedure which may be useful in evaluating evidence of the existence of a discriminatory motive. *McDonnell Douglas* does not address in any way the quite separate issue of causation, particularly the question of which party bears the burden of proof regarding what the defendant would have done in the absence of discrimination. *McDonnell Douglas*' silence regarding that issue is hardly surprising, because it was decided four years before this Court first considered the causation issue in *Mt. Healthy*.

In *Price Waterhouse*, on the other hand, the central issue, unlike *McDonnell Douglas*, was the question of causation.[56] A majority of the Court agreed that, once a plaintiff establishes that an impermissible consideration was a motivating factor, the plaintiff is entitled to prevail unless the employer proves by a preponderance of the evidence that it would have

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[56] 490 U.S. at 238-55 (plurality opinion), 258-61 (White, J., concurring), 261-79 (O'Connor, J., concurring), 279-95 (Kennedy, J., dissenting), 281 (Kennedy, J. dissenting) ("[t]he plurality's causation analysis is misdirected.").

made the same decision in the absence of discrimination. See 490 U.S. at 260 (White, J., concurring) (agreeing with the plurality's "approach to causation.")

The Eighth Circuit erred in assuming that direct and circumstantial evidence of a discriminatory motive are to be evaluated separately under distinct "frameworks," as if discrimination-proven-by-direct-evidence and discrimination-proven-by-circumstantial evidence were separate claims. In deciding whether an impermissible purpose was a motivating factor, the trier of fact considers *all* the evidence together, regardless of whether some of that evidence might be characterized as direct evidence. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252; 266 (1977).[57] "As in any lawsuit, a plaintiff may

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[57] See *Vieth v. Jubelirer*, 541 U.S. 267, 280 (2004) (racial motive); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (racial motive) (quoting *Arlington Heights*); *Abrams v. Johnson*, 521 U.S. 74, 81 (1997) (racial motive); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 488 (1997) (racial motive) (quoting *Arlington Heights*); *Bush v. Vera*, 517 U.S. 952, 1000 (1996) (racial motive); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (racial motive); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (racial motive); *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (religious motive); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (political motive); *Rose v. Clark*, 478 U.S. 570, 572 (1986) (malice); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quoting *Arlington Heights*); *Rowland v. Mad River Local School*

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prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983). In the evaluation of that evidence, whether each particular item of evidence might under some classification system be deemed direct or indirect evidence is wholly irrelevant. No decision of this Court has suggested that direct and circumstantial evidence are to be separately assessed in different "frameworks," or that the trier of fact in evaluating evidence ought first decide whether it was direct or non-direct in nature.

McDonnell Douglas does not establish a rigid comprehensive framework within which certain (or all) evidence of discrimination must be evaluated. *McDonnell Douglas* merely imposes a burden of production, requiring a defendant to articulate a legitimate non-discriminatory reason if the plaintiff has established a prima facie case of discrimination. But presence vel non of that burden of production, and the standards regarding when it is created, are irrelevant whenever a defendant *has* offered evidence of such a non-discriminatory reason. "If...the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant."

Dist., 470 U.S. 1009, 1017 n.13 (1985) (motive based on sexual preference); *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (racial motive) (quoting *Arlington Heights*).

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993).

> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case [under *McDonnell Douglas*], whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).[58] In the instant case, the defendant had met its burden of production, offering at trial evidence of several non-discriminatory purposes which it asserted were the reasons for Gross's demotion. Neither *McDonnell Douglas* nor *Price Waterhouse* provide any particular "framework" for determining, once such non-discriminatory justifications have been offered, whether an unlawful purpose was in fact a motivating factor

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[58] *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008):

> In a Title VII disparate-treatment suit where an employee has suffered an adverse action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not – *and should not* – decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.

(Emphasis in original).

underlying the employment decision at issue. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143-53 (2000).

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be vacated, and the case remanded for further consideration consistent with the opinion of the Court.

Respectfully submitted,

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Federal Statutes Establishing Elevated Evidentiary Requirements

3 U.S.C. § 20 (written evidence)

5 U.S.C. § 1214(b)(4)(B)(ii) ("clear and convincing evidence")

5 U.S.C. § 1221(e)(2) ("clear and convincing evidence")

6 U.S.C. § 1142(c)(2)(B) ("clear and convincing evidence")

7 U.S.C. § 1736f-1(c)(1)(A)(i)(I) ("clear evidence")

7 U.S.C. § 2009h (written evidence)

8 U.S.C. § 1154(a)(2)(A)(i) ("clear and convincing evidence")

8 U.S.C. § 1158(a)(2)(B) ("clear and convincing evidence")

8 U.S.C. § 1182(a)(3)(B)(i)(VI) ("clear and convincing evidence")

8 U.S.C. § 1229a(b)(5)(A) ("clear, unequivocal, and convincing evidence")

8 U.S.C. § 1229a(c)(1) ("clear and convincing evidence")

8 U.S.C. § 1229c(b)(1)(D) ("clear and convincing evidence")

8 U.S.C. § 1232(c)(3)(B) ("objective evidence")

8 U.S.C. § 1252(f)(2) ("clear and convincing evidence")

8 U.S.C. § 1255(e)(3) ("clear and convincing evidence")

8 U.S.C. § 1324a(a)(6)(C)(ii) ("clear and convincing evidence")

8 U.S.C. § 1409(a)(1) ("clear and convincing evidence")

8 U.S.C. § 1448(a) ("clear and convincing evidence")

8 U.S.C. § 1612(a)(2)(A)(H)(ii) ("clear and convincing evidence")

10 U.S.C. § 850a(b) ("clear and convincing evidence")

10 U.S.C. § 949k(b) ("clear and convincing evidence")

10 U.S.C. § 1201(b)(3)(B)(i) ("clear and unmistakable evidence")

11 U.S.C. § 362(c)(3) ("clear and convincing evidence")

11 U.S.C. § 502(k)(2) ("clear and convincing evidence")

12 U.S.C. § 2503 (written evidence)

15 U.S.C. § 2087(b)(2)(B) ("clear and convincing evidence")

15 U.S.C. § 6604(a) ("clear and convincing evidence")

15 U.S.C. § 6604(b)(3) ("clear and convincing evidence")

16 U.S.C. § 284c(b)(3) ("clear evidence")

18 U.S.C. § 17(b) ("clear and convincing evidence")

18 U.S.C. § 924(d)(1) ("clear and convincing evidence")

18 U.S.C. § 3142(f)(2)(B) ("clear and convincing evidence")

18 U.S.C. § 3143 ("clear and convincing evidence")

18 U.S.C. § 3148(b)(1)(B) ("clear and convincing evidence")

18 U.S.C. § 3524(e)(1) ("clear and convincing evidence")

18 U.S.C. § 3559(c)(3) ("clear and convincing evidence")

18 U.S.C. § 3563(b)(21) ("clear and convincing evidence")

18 U.S.C. § 3600(a)(10)(A)(ii) ("clear and convincing evidence")

18 U.S.C. § 3600(g)(2) ("compelling evidence")

18 U.S.C. § 3626(a)(3)(E) ("clear and convincing evidence")

18 U.S.C. § 3771(a)(3) ("clear and convincing evidence")

18 U.S.C. § 4243(d) ("clear and convincing evidence")

18 U.S.C. § 4246(d) ("clear and convincing evidence")

18 U.S.C. § 4248(d) ("clear and convincing evidence")

19 U.S.C. § 1592(e)(2) ("clear and convincing evidence")

19 U.S.C. § 1593a(i)(2) ("clear and convincing evidence")

19 U.S.C. § 2252(d)(2)(A) ("clear evidence")

20 U.S.C. § 1092(f)(4)(B)(iii) ("clear and convincing evidence")

20 U.S.C. § 1412(a)(17)(C) ("clear and convincing evidence")

20 U.S.C. § 6736(c)(1) ("clear and convincing evidence")

20 U.S.C. § 9578(a)(3) ("clear and convincing evidence")

22 U.S.C. § 1972(2) ("clear and convincing evidence")

22 U.S.C. § 6082(a)(2) ("clear and convincing evidence")

25 U.S.C. § 458aaa-6(a)(2)(D) ("clear and convincing evidence")

25 U.S.C. § 458aaa-17 ("clear and convincing evidence")

25 U.S.C. § 1912(e) ("clear and convincing evidence")

25 U.S.C. § 2206(a)(4) ("clear and convincing evidence")

25 U.S.C. § 2504(b)(2)(B) ("clear and convincing evidence")

26 U.S.C. § 47(d)(3)(D) ("clear and convincing evidence")

26 U.S.C. § 148(b)(4)(E) ("objective evidence")

26 U.S.C. § 280G(b) ("clear and convincing evidence")

26 U.S.C. § 357(b)(2) ("clear preponderance of the evidence")

26 U.S.C. § 613A(b)(3) ("clear and convincing evidence")

26 U.S.C. § 1260(e) ("clear and convincing evidence")

26 U.S.C. § 1551(a) ("clear preponderance of the evidence")

26 U.S.C. § 7409(b) ("clear and convincing evidence")

28 U.S.C. § 352(b)(1)(B) ("conclusively refuted by objective evidence")

28 U.S.C. § 592(a)(2)(B)(ii) ("clear and convincing evidence")

28 U.S.C. § 2244(b)(2)(B)(ii) ("clear and convincing evidence")

28 U.S.C. § 2254(e) ("clear and convincing evidence")

28 U.S.C. § 2255(h)(1) ("clear and convincing evidence")

28 U.S.C. § 2639(b) ("clear and convincing evidence")

29 U.S.C. § 106 ("clear proof")

29 U.S.C. § 464(c) ("clear and convincing evidence")

29 U.S.C. § 721(a)(10)(C)(i)(II) ("clear and convincing evidence")

29 U.S.C. § 721(a)(10)(C)(i)(II) ("clear and convincing evidence")

29 U.S.C. § 722(a)(2)(A) ("clear and convincing evidence")

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29 U.S.C. § 1344(f)(4) ("clear and convincing evidence")

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31 U.S.C. § 1501(a) (documentary evidence)

31 U.S.C. § 6711(c) ("clear and convincing evidence")

35 U.S.C. § 273(b)(4) ("clear and convincing evidence")

36 U.S.C. § 220525(a)(2)(A) ("clear and convincing evidence")

36 U.S.C. § 220527(b) ("clear and convincing evidence")

38 U.S.C. § 1111 ("clear and unmistakable evidence")

38 U.S.C. § 1133(b) ("clear and unmistakable evidence")

38 U.S.C. § 1154(b) ("clear and convincing evidence")

38 U.S.C. § 24111(c) ("clear and convincing evidence")

42 U.S.C. § 247d-6d(c)(3) ("clear and convincing evidence")

42 U.S.C. § 247d-6e(b) ("compelling, reliable, valid, medical and scientific evidence")

42 U.S.C. § 300aa-22(b)(2)(B) ("clear and convincing evidence")

42 U.S.C. § 666(a)(5)(J) ("clear and convincing evidence")

42 U.S.C. § 1973b(a)(9) ("objective and compelling evidence")

42 U.S.C. § 3796b(5)(ii) ("convincing evidence")

42 U.S.C. § 4605(c) ("clear and convincing evidence")

42 U.S.C. § 5851(b)(3) ("clear and convincing evidence")

42 U.S.C. § 6313(a)(6)(A)(ii)(II) ("clear and convincing evidence")

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42 U.S.C. § 11603(e)(2)(A) ("clear and convincing evidence")

42 U.S.C. § 14503(e)(1) ("clear and convincing evidence")

42 U.S.C. § 14924(e)(4) ("clear and convincing evidence")

42 U.S.C. § 17196(b)(2) ("clear and convincing evidence")

45 U.S.C. § 905(b) ("clear and convincing evidence")

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47 U.S.C. § 338(i)(9)(A) ("clear and convincing evidence")

47 U.S.C. § 339(a)(2)(D)(viii) ("clear and convincing evidence")

47 U.S.C. § 532(f) ("clear and convincing evidence")

47 U.S.C. § 511(h)(1) ("clear and convincing evidence")

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49 U.S.C. § 42121(b)(2)(B) ("clear and convincing evidence")

49 U.S.C. § 60129(b)(2)(B)(2) ("clear and convincing evidence")

RESPONDENT'S BRIEF

Supreme Court, U.S.
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No. 08-441

In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

RULE 29.6 STATEMENT

FBL Financial Group, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, ("ADEA"), the court of appeals applied this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and correctly held that the trial court had improperly instructed the jury, mandating reversal and a new trial. Specifically, the court held that, without sufficient evidence of discriminatory motive, the jury instructions improperly shifted to the employer the burden of persuading the jury that the employer acted for permissible rather than impermissible age-based reasons.

Petitioner Jack Gross and the United States argue that this Court should re-examine and reject *Price Waterhouse*'s requirement that the employee must present "substantial" or "direct" evidence of discrimination to shift the burden of proof on causation to the employer. *See id.* at 259 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment). If *Price Waterhouse* is to be re-examined, however, all aspects should be reconsidered. The burden shifting it authorizes is inconsistent with the text and purpose of the ADEA; it is a departure from conventional rules of civil litigation; its precise holding was never resolved; and it is unworkable and unfair to employers. This Court should hold that the *McDonnell Douglas* framework governs all cases and that the employee always retains the burden of proof on causation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For

this reason, the court of appeals' judgment that the jury instructions were unlawful should be affirmed.

Unless the Court overrules *Price Waterhouse*, it, and not *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), still governs under the ADEA. And, under *Price Waterhouse*, Gross clearly failed to present substantial or direct evidence of intentional age discrimination sufficient to shift the burden of persuasion to FBL. Shifting the burden of persuasion on the ultimate issue of whether the challenged act was taken for a discriminatory reason is an extraordinary departure from the ordinary rules of civil litigation. If this is to occur at all, it should occur only under a heightened standard. Moreover, the heightened "substantial" or "direct" standard of *Price Waterhouse* is not, as Gross and the United States claim, a requirement for evidence that is not circumstantial. Although there is conflict on this question, many courts of appeals have correctly treated it as a requirement that the employee produce substantial evidence that directly relates to the decisionmaking process that resulted in the adverse employment action at issue. For this reason also, the court of appeals' judgment that the jury instructions were unlawful should be affirmed.

STATEMENT OF THE CASE

1. *Background.* Respondent FBL Financial Group, Inc. ("FBL") is a publicly traded corporation

affiliated with, and responsible for managing, several entities, including Farm Bureau Mutual Insurance Company, a property-casualty insurer. Appellant's Appendix 520-21. FBL has its headquarters in Des Moines, Iowa, and has property-casualty insurance operations in Iowa, Arizona, Kansas, Minnesota, Nebraska, New Mexico, South Dakota, and Utah. Appellant's Appendix 518, 521.

As with many companies over the years, FBL's internal and external structure has changed from time to time. This case arises out of two such changes and Gross's role in them. Gross, born in 1948, began working for a predecessor to FBL in 1987. Pet. App. 2a. Over time he rose through the ranks until, in 1999, he was promoted to Claims Administration Vice President with oversight responsibility for physical damage, property specialists, workers' compensation, medical supervision, subrogation, call center, and the processing portions of FBL's property-casualty claims operations. Tr. 69-70, 72, 293.

In 2000, Barbara Moore became FBL's Chief Operating Officer for property-casualty claims companies. Tr. 640-41. One of Moore's first decisions in her new role was to streamline the management structure and improve the efficiency of FBL's claims department in which Gross worked. Tr. 90, 95, 417, 419-20. As part of that process, Moore removed Gross's vice president title and renamed his position "Claims Administration Director." Pet. App. 2a. Although neither his salary nor his job responsibilities changed, Pet. App. 2a, Gross nevertheless considered

the alteration a demotion because FBL reduced the "points" assigned to Gross's position.[1] Pet. App. 2a.

As part of the same reorganization, Moore also demoted Gross's boss, Tom Eppenauer, and replaced him with Andy Lifland.[2] Tr. 83, 284, 289, 417. Eppenauer had hired Gross in 1987, Tr. 63, and had repeatedly recommended Gross for promotions and generous merit salary increases. Tr. 72, 82, 107, 285; Appellant's Appendix 383, 387-88, 391-95, 402, 409, 416, 423, 430. Gross was fiercely loyal to Eppenauer as a result.

That loyalty did not transfer to Moore or Lifland. Gross thought Moore and Lifland were "outsiders" who brought unwanted change to an organization that had been efficiently run by "Midwest farm boy[s]." Tr. 187, 194-95, 202-06. Gross was distraught over Eppenauer's demotion and criticized Lifland and

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[1] FBL uses the Hay point system as a blind method of valuing positions, as opposed to individuals, within the company. Tr. 86-87, 612-15. Factors considered in the point assignment include job knowledge, accountability, decisionmaking responsibilities and problem solving responsibilities. Tr. 612-15. Salary grade for each position at FBL is determined based on the number of Hay points assigned to it. Tr. 86-87, 612-15.

[2] There was never any debate that Eppenauer's demotion was unrelated to age. Indeed, Eppenauer acknowledged that he was "exactly the same age" as his replacement, Lifland. Tr. 334. Eppenauer believed he was demoted because Moore wanted to work with Lifland, a person with whom she had worked for several years in the Arizona-New Mexico Farm Bureau operation before moving to Iowa. Tr. 290, 316, 418-19.

Moore because they did not share Eppenauer's vision for the claims department. Tr. 64-65, 103. Indeed, Gross believed the entire reorganization was unnecessary. Tr. 100-03.

After the reorganization, Gross repeatedly described Lifland with generalized animosity, contempt, and criticism. Tr. 105-07, 231. In one noteworthy instance, Gross and Lifland's interaction devolved into an argument with Lifland contending Gross had called him a liar. Tr. 120-21, 241-43; Appellant's Appendix 576. Gross was particularly upset by Lifland's evaluations of his performance, starting with the first evaluation of Gross that Lifland completed shortly after the reorganization. Tr. 98, 110-17; Appellant's Appendix 507, 516. According to Gross, Lifland's evaluations were unduly critical of him. Tr. 98, 110-17, 229, 231-32. In fact, the undisputed record reflected that all of Lifland's evaluations, including his evaluations of Gross, were substantially less generous than Eppenauer's.[3]

On January 1, 2003, Farm Bureau Insurance Company of Nebraska and Farm Bureau Mutual Insurance Company, Inc., a Kansas entity, merged with the Farm Bureau Mutual Insurance Company headquartered in Iowa. Tr. 403-04. The merger

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[3] Specifically, Lifland's performance evaluation scores for all employees were, on average, 15-20 points less than Eppenauer's average scores. Tr. 592-93; Appellant's Appendix 562. Gross was treated like all other employees Lifland supervised.

prompted a second reorganization of FBL's claims department. Tr. 532. As a result of this second reorganization, FBL added 175-200 employees to the claims department,[4] Tr. 597, and significantly altered its management structure. Tr. 532.

In particular, FBL named Lifland Vice President of Claims, Tr. 444, and Steve Wittmuss, who came from the Nebraska organization, Regional Claims Vice President, a new position designed to serve as Lifland's "second in command." Tr. 444. In addition, FBL transferred oversight responsibilities of several functional reporting units, including property, workers' compensation and medical management, from Gross's pre-merger position to the new Regional Claims Vice President position. Tr. 130, 445; Appellant's Appendix 527, 540.

Due to this reduction in oversight responsibilities, FBL changed the title of the Claims Administration Director position to Claims Administration Manager and eliminated the Director position. Tr. 445; Appellant's Appendix 550-51. The new position was left with responsibility only for oversight of the direct loss reporting unit that handled claim calls, processing, and subrogation. Tr. 577-78; Appellant's Appendix 539, 545. FBL reduced the points and

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[4] FBL offered a voluntary early retirement incentive plan ("VERIP") to qualifying Kansas and Nebraska employees over age 52. Tr. 596-97. Gross was not offered the VERIP because, as an Iowa employee, he was not eligible. Tr. 122, 603.

salary grade associated with the downgraded Claims Administration Manager position to reflect the reduction in responsibilities.[5] Appellant's Appendix 504, 547-51. FBL also created a Claims Project Coordinator position to tackle integration issues that arose with the merger. Tr. 505-06; Appellant's Appendix 554-55. That position had the same salary points and pay grade as the Claims Administration Manager position. Pet. App. 2a.

Lifland and Wittmuss decided to assign Gross to the Claims Project Coordinator position. Tr. 124, 445, 532-33; Appellant's Appendix 504. As Gross acknowledged, Lifland and Wittmuss made the assignment because they believed it was the best fit for him, since the position generally was project oriented and Lifland and Wittmuss believed Gross was a strong project manager. Tr. 123-24, 126, 432, 437-38, 507, 532-33. Simultaneously, Lifland and Wittmuss decided to assign Lisa Kneeskern, an employee in her 40s, to the Claims Administration Manager position. Tr. 129; Appellant's Appendix 504-05. Like Gross, Kneeskern had continuously worked in the insurance

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[5] Gross argued that the Claims Administration Director position was not eliminated, but later admitted under oath in post-trial proceedings that the position no longer existed. Appellant's Appendix 626-27. The district court found that "Gross' former position no longer exists." Appellant's Appendix 633.

industry for approximately 20 years and met the qualifications for the position. Tr. 572-74, 577-78.[6]

Although his salary was not reduced, Tr. 88, 244; Appellant's Appendix 464, Gross believed the reassignment was a demotion because his points and salary grade were reduced,[7] and because he believed Kneeskern "assumed the functional equivalent of [his] former position, and his new position was ill-defined and lacked a job description or specifically assigned duties." Pet. App. 2a-3a.

2. *Proceedings.* Gross brought suit against FBL in the United States District Court for the Southern District of Iowa, alleging that, by assigning him to the Claims Project Coordinator position, the company intentionally discriminated against him because of his age in violation of the ADEA.[8]

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[6] Kneeskern was the subrogation manager prior to the merger. Appellant's Appendix 529. Eppenauer, who had previously supervised Kneeskern, testified that she was a "very good" employee, capable of performing well in the Claims Administration Manager position. Tr. 327, 333-34.

[7] Gross continued to be paid over $100,000 annually, Tr. 228, 244; Appellant's Appendix 464, and continued to receive annual merit salary increases after the merger. Tr. 244; Appellant's Appendix 464. Gross was, however, dissatisfied that his annual salary increases would no longer be in the 3-5% range. Tr. 100.

[8] Gross also pled claims of retaliation under the ADEA and the Iowa Civil Rights Act, Iowa Code ch. 216 (2005). The district court granted FBL summary judgment on the retaliation claims, J.A. 22-24, and Gross did not challenge that disposition on

(Continued on following page)

From the inception of the lawsuit, Gross's disparate treatment claim of discrimination rested on two theories: (1) there was no reason for his demotion, so it must have been because of his age; and (2) the other claims department employees over the age of 50 who were holding management positions were demoted at the same time. Complaint ¶¶ 13, 15-16.[9] At no time did Gross point to any statements made by any decisionmakers demonstrating an illegitimate factor played a substantial role in the employment decision that would suggest his placement in the new position was the result of age-based animus. At trial, no witness was aware of facts to show that age was a factor in the decision to assign Gross to the Claims Project Coordinator position. Tr. 157, 160-61, 248-49, 273, 363-64, 441-42, 445, 533, 570, 579-80, 619, 623.

Gross presented evidence regarding the impact of the merger on other "demoted" employees holding

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appeal. Gross also sought to amend his Complaint to assert a disparate impact claim under the ADEA. The district court denied leave to amend, finding that under *Smith v. City of Jackson*, 544 U.S. 228 (2005), the proposed amendment was futile. Gross did not appeal that denial.

[9] On direct examination, Gross testified that he was inferring age discrimination based on the treatment of others and the absence of any other explanation. J.A. 6 ("The only common thread was age."); J.A. 6 ("It was just a lack of any other reason."). In closing arguments, too, Gross's counsel acknowledged there was no evidence of age discrimination, and urged the jury to infer age was a motivating factor because "there simply was no other reason." Tr. 694; *see also* Tr. 701, 740-41, 746.

middle management positions in the claims department. In particular, Gross argued that the majority of employees holding such positions fell within the class protected by the ADEA.[10] FBL responded that although true, this fact was unsurprising, given that more than half of the employees holding middle management positions in the claims department were over the age of 50 in January 2003, Tr. 219-20; Appellant's Appendix 504-05, and more than three-quarters were over age 40. Appellant's Appendix 504-05.[11]

After a five-day trial, the district court submitted Gross's age discrimination claims under the ADEA and Iowa Civil Rights Act to a jury. The district court charged the jury that Gross had the burden to prove that "defendant demoted plaintiff to claims project coordinator effective January 1, 2003" and "plaintiff's age was a motivating factor in defendant's decision to demote plaintiff." J.A. 9-10. The district court instructed the jury that it could "find age was a motivating factor if [it found] defendant's stated reasons for its decision [were] not the real reasons, but [were] a pretext to hide age discrimination." J.A. 10. In a

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[10] No other person who was affected by the reorganization complained of age-based discrimination. Hills Test. Tr. 156-57; Juhl Test. Tr. 272.

[11] The company's demographics only skewed further over time. By November 2005, FBL's workforce predominately fell within the class protected by the ADEA. At the time of trial, the average age of all FBL employees was 48, Tr. 599, more than 60% of FBL's workforce was over age 40, Tr. 599-600, and nearly 30% was over age 50. Tr. 599.

separate instruction, the district court instructed the jury

> As used in these instructions, plaintiff's age was a "motivating factor," if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff.

J.A. 10. Most relevant for the purposes of this case, the district court further charged the jury that the "verdict must be for defendant . . . if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." *Id.*

FBL objected to these instructions, and proposed the following in their place:

> Your verdict must be for Plaintiff if both of the following elements have been proven by the preponderance of the evidence:
>
> 1) Defendant demoted Plaintiff to claims project coordinator effective January 1, 2003; and
>
> 2) Plaintiff's age was the determining factor in Defendant's decision.
>
> If either of the above elements has not been proven by the preponderance of the evidence, your verdict must be for Defendant.

> "Age was a determining factor" only if Defendant would not have made the employment decision concerning Plaintiff but for his age; it does not require that age was the only reason for the decision made by Defendant.

J.A. 9.

The jury returned a verdict for Gross, awarding lost compensation in the amount of $46,945, consisting of $20,704 for lost past salary and $26,241 for lost past stock options. J.A. 8. The jury declined to award Gross damages for emotional distress, which were only available under state law. *Id.* The jury also found FBL's conduct was not willful. *Id.* Gross did not appeal these adverse rulings.

FBL appealed the decision to the Eighth Circuit, arguing, *inter alia*, that the district court erred in using a mixed-motive instruction. Relying on this Court's decision in *Price Waterhouse*, the Eighth Circuit articulated the standard for a mixed-motive jury instruction as follows:

> [T]o justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. . . .

Pet. App. 5a. The court of appeals then explained the meaning of "direct evidence":

> "Direct evidence" for these purposes is evidence "showing a specific link between the

> alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas*, 111 F.3d at 66 (internal quotation and brackets omitted). It does not extend to "stray remarks in the workplace," "statements by non-decision makers," or "statements by decision makers unrelated to the decisional process itself."

Pet. App. 5a. Using this "direct evidence" standard, the Eighth Circuit determined the district court's instruction was improper, since

> [t]he disputed instruction, however, provided that if Gross proved by any evidence – direct or otherwise – that age was "a motivating factor" in the employment decision, then the burden shifted to FBL to prove that its decision would have been the same absent consideration of Gross's age. . . . Gross conceded that he did not present "direct evidence" of discrimination . . . so a mixed motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.

Pet. App. 6a-7a. The Eighth Circuit thus reversed the judgment of the district court and remanded for a new trial. Pet. App. 12a.

SUMMARY OF THE ARGUMENT

The text of the ADEA prohibits an employer from discriminating against any individual "because of such individual's age." 29 U.S.C. § 623(a)(1). In its decision in *Price Waterhouse*, this Court interpreted analogous language in Title VII ("because of such individual's sex"). A badly splintered majority agreed that if the employee presents sufficient evidence that sex was a motivating factor, among others, in an employer's challenged decision, the burden of persuasion on causation shifts to the employer to demonstrate that it would have taken the same action for legitimate reasons.

The majority did not agree, however, about what constituted sufficient evidence to shift the burden of persuasion to the employer. Justice O'Connor's concurring opinion posited that the shift required "direct evidence" of sex discrimination, *id.* at 276; Justice White's concurrence concluded that a "substantial" showing of sex discrimination was required, *id.* at 259. In the lower courts, the fractured nature of the decision resulted in confusion about the precise holding of the case, as this Court has recognized. *See Desert Palace*, 539 U.S. at 98.

This situation was further complicated by the passage of the Civil Rights Act of 1991 ("1991 Act"). That Act amended Title VII and statutorily overruled *Price Waterhouse* as it applied to Title VII, *id.* at 98-101; but Congress did not apply that specific amendment to the ADEA. The rules of production and persuasion governing cases arising under Title VII are now established by express statutory text, *see* 42 U.S.C. § 2000e-2(m), which was authoritatively interpreted by this Court in *Desert Palace*. But, Congress's deliberate choice not to extend that amendment to the ADEA means that *Price Waterhouse* governs cases under the ADEA, unless and until this Court overrules it.

The instant case arises in this setting. Both parties are, in essence, asking this Court to overrule *Price Waterhouse*. The United States asks this Court to hold that *Desert Palace* overruled the direct evidence requirement of *Price Waterhouse* not only as it would have applied under Title VII, but also as it now applies to cases under the ADEA. But the 1991 Act's revised framework for analysis of disparate treatment claims cannot reasonably be imposed on the ADEA when Congress deliberately chose not to do so.

FBL does agree, however, that *Price Waterhouse* should be re-examined: Its holding was never clear; it is a departure from conventional rules of civil litigation; it proved unworkable in practice; and it has unfairly shifted to employers the burden of persuasion. As FBL will demonstrate, if *Price Waterhouse* is to be reconsidered, all of it should be revisited, and

this Court should hold that the *McDonnell Douglas* framework governs in all cases and that the employee always retains the burden of demonstrating that the challenged employment action was "because of such individual's age." In that event, the jury was clearly misinstructed and therefore the case should be retried.

Alternatively, if this Court concludes that in some circumstances, the employee may present sufficient evidence that the employer acted "because of" age to shift to the employer the burden of persuading the factfinder that it acted for legitimate reasons, this Court should require at least substantial or direct evidence of unlawful motive.

The thrust of both Justice White's and Justice O'Connor's opinions concurring in the judgment in *Price Waterhouse* is that shifting the burden of persuasion on the ultimate issue of whether the challenged act was actually taken for a discriminatory reason is an extraordinary departure from the ordinary rules of civil litigation. The employee generally must show that the alleged harm was caused by discrimination, and it is unusual to require the employer affirmatively to prove that the alleged harm had another cause. It converts an element of the employee's affirmative case into an affirmative defense that must be proven by the employer, even though in the usual case, an employer would not have to prove an affirmative defense unless the employee had established his or her claim.

FBL thus submits that before the burden can shift, either "substantial" or "direct" evidence of discrimination should be required. It is important to understand what the word "direct" means in this context. It seems quite unlikely that Justice O'Connor originally intended her reference to "direct" evidence to stand in contrast to "circumstantial" evidence. Instead, "direct" evidence means evidence that is related directly to the challenged decision, *see* 490 U.S. at 271. Justice O'Connor's argument was that employees seeking the extraordinary advantage of shifting the burden of persuasion must bear more of a burden than merely a prima facie case. Put differently, the employee must present evidence that would allow the factfinder to conclude that discrimination was the proximate cause of the employer's action before the burden of proof on causation can be shifted.

The evidence presented here was neither substantial nor direct, and it did not support a shift in the burden of proof. The jury instructions were therefore erroneous. The court of appeals' judgment should be affirmed.

ARGUMENT

I. THE BURDEN OF PERSUASION AS TO CAUSATION SHOULD NEVER BE SHIFTED TO THE EMPLOYER TO DISPROVE DISPARATE TREATMENT AGE DISCRIMINATION.

Gross and the United States argue that because the statutory language of the ADEA does not contain any special evidentiary provision requiring direct evidence to shift the burden of persuasion as to causation to the employer in a case alleging disparate treatment, this Court's typical reliance on "conventional rules of civil litigation" dictates that no such requirement should be imposed. Petitioner's Brief 11, 13, 26. Instead, Gross and the United States contend that, in all ADEA disparate treatment cases, once the employee presents any evidence of age-based animus, the burden of persuasion should shift to the employer to prove the absence of causation. Petitioner's Brief 47-48.

FBL agrees the language of the ADEA contains no elevated evidentiary threshold. To that extent, therefore, FBL agrees with Gross's and the United States' contention. But Gross and the United States fail to follow their argument to its logical conclusion, namely, that just as the ADEA contains no elevated evidentiary threshold, it also contains no provision requiring a shift of the burden of persuasion on causation to the employer. As a consequence, as would be true under "conventional rules of civil litigation," in disparate treatment cases, "[t]he ultimate burden

of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)).

A. The ADEA prohibits taking adverse employment action against an employee "because of" that employee's age.

The ADEA makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). As the language makes plain, an employer is liable for violating the ADEA only if it takes an employment action adverse to an employee based on the employee's age. The outer reaches of the meaning of the phrase "because of" are not free from doubt, but FBL believes the phrase is best interpreted as imposing a common sense but-for causation standard.[12] In the mine-run of cases, therefore, of which

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[12] The Oxford English Dictionary defines the word "because" as "for the reason that." 2 Oxford English Dictionary 41 (2d ed. 1989). Webster's Third New International Dictionary defines "because of" as "by reason of" or "on account of." Webster's Third New International Dictionary 194 (2002). Each of these definitions suggests that "because of" means had a determinative influence on the outcome. Nor was this definition any

(Continued on following page)

this case is certainly one, a factfinder must find that age-related animus caused the employer's challenged action to find a violation. If the employer acted for some other reason or reasons, it did not act "because of" the employee's age.

Senator Yarborough, floor manager of the bill that became the ADEA, noted in his opening statement describing the purpose of the legislation and its major provisions: "In simple terms, this bill prohibits discrimination in hiring and firing workers *solely because* they are over 40. . . ." 113 Cong. Rec. 31,252 (1967) (emphasis added). Similarly, the Committee Report on the ADEA recognized that "[t]he purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a *determining factor* in a refusal to hire." 113 Cong. Rec. 31,251 (1967) (emphasis added).

Indeed, this Court has repeatedly interpreted the ADEA's statutory text to require an employee to prove as an essential element of his claim that the consideration of age was outcome determinative as to the adverse action at issue. *See, e.g.*, *Reeves*, 530 U.S. at 141 ("the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a *determinative influence* on the outcome'") (emphasis added); *Hazen Paper Co. v. Biggins*, 507

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different when the ADEA was enacted. Webster's Third New International Dictionary 194 (1966) ("by reason of: on account of").

U.S. 604, 610 (1993) (the employee must prove that age actually motivated the employer's decision).

Most recently, in *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008), this Court was faced with the question whether Kentucky's retirement system for those working in hazardous positions violated the ADEA because it treats some who become disabled *before* becoming eligible for retirement more favorably than it treats some who become disabled *after* becoming eligible for retirement on the basis of age. Even though the potential size of an employee's retirement benefits depended on his or her age at the time of disability, this Court held that, for several reasons, the distinctions in the Kentucky system "were not '*actually motivated*' by age." *Id.* at 2367 (emphasis added). That holding makes sense only if the ADEA requires that age be the *actual* cause of the challenged action.[13]

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[13] This Court has interpreted comparable statutory text under Title VII, 42 U.S.C. § 2000e-2(a), to require an employee to prove that consideration of an unlawful factor was outcome determinative in the adverse action at issue. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 256; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (to establish causation, a plaintiff must show the impermissible consideration was a "but for" cause of the adverse employment action). In these cases, the Court has consistently held that the ultimate question is "discrimination *vel non*." *Reeves*, 530 U.S. at 143; *St. Mary's Honor Ctr.*, 509 U.S. at 518; *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

B. Under the ADEA, the burden of persuasion as to causation must at all times remain with the employee presenting a disparate treatment claim.

Just as the language of the ADEA is clear that it requires "but-for" causation to hold an employer liable for age discrimination, it is equally clear that the ADEA never shifts to the employer the burden of persuasion as to that causation determination. Indeed, one will search in vain for any language in the ADEA purporting to shift the burden of persuasion to the employer with respect to causation.[14]

Against that backdrop, this Court has consistently held that conventional rules of civil litigation are applicable to federal employment discrimination statutes, *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2406 (2008); *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 99 (2003); *Aikens*, 460 U.S. at 714 n.3, primary among which is the rule that, absent

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[14] The legislative history of the ADEA supports the best reading of the text. Senator Javits made the following comment:

> The whole test is somewhat like the test in an accident case – did the person use reasonable care. A jury will answer yes or no. The question here is: Was the individual discriminated against solely because of his age? The alleged discrimination must be proved *and the burden of proof is upon the one who would assert that that was actually the case.*

113 Cong. Rec. 31,255 (1967) (emphasis added). The bill sponsor, Senator Yarborough, agreed in substance with Senator Javits's interpretation.

statutory language otherwise allocating the burden of production and persuasion, the "plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 103 (3d ed. 2003) (standard rule is the plaintiff asserting a claim "wins only if, on the basis of the evidence, the facts seem more likely true than not").

That is of course, why, even when this Court first grappled with Congress's newly minted anti-discrimination statutes in *Burdine* and *McDonnell Douglas*, the Court left the burden of persuasion where it traditionally lay – with the plaintiff-employee. In both cases, although the Court created a framework for determining causation – specifically, the employee must present a prima facie case of discrimination at which time the burden of production switches to the employer to proffer a non-discriminatory reason – it never abandoned the traditional rule.[15] Rather, this Court was careful to note, that "[t]he ultimate burden of persuading the

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[15] This Court has long and explicitly recognized the significant difference between shifting the burden of production and shifting the burden of persuasion. In *St. Mary's Honor Center*, the Court noted its authority to, "according to traditional practice, establish certain modes and orders of proof" including a rebuttable presumption of the sort established by *McDonnell Douglas*. 509 U.S. at 514; *see also Burdine*, 450 U.S. at 255 n.8. Courts have the inherent power to control the modes and methods of proof. Fed. R. Evid. 301.

trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

The only place in the ADEA in which one finds support for placing the burden of persuasion on the employer at all is in Section 623(f), which defines the ADEA's affirmative defenses. More specifically, after delineating the ways in which an employer could violate the ADEA, Congress, in 29 U.S.C. § 623(f), provided an employer may, without violating the ADEA, rely on age in the following ways: 1) employ "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; 2) employ a differentiation based on reasonable factors other than age; 3) employ a differentiation in order to comply with local foreign law; 4) observe the terms of a bona fide seniority system (with some exceptions); and 5) observe the terms of a bona fide employee benefit plan (with some exceptions).

As this Court noted in *Meacham v. Knolls Atomic Power Laboratory*, the placement and purpose of these provisions make clear that they are affirmative defenses. 128 S.Ct. at 2400 ("Given how the [ADEA] reads, with exemptions laid out apart from the prohibitions (and expressly referring to prohibited conduct as such)," this Court has consistently described the provisions contained in Section 623(f) as "the ADEA's 'five affirmative defenses.'" (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985))). And, because they are affirmative defenses, the Court

held that they should be interpreted against the "longstanding convention" that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Id.* (quoting in part, *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)).

Meacham is important here for two reasons. First, it demonstrates that this Court, when interpreting the ADEA, has chosen not to depart from settled conventions concerning the placement of the burden of persuasion and that it would not generally do so unless it has "compelling reasons" to think Congress intended that result. *See Meacham*, 128 S.Ct. at 2400. For all the reasons noted above, no such compelling reasons exist here.

Second, *Meacham* makes plain that when Congress wished to place the burden of proof on employers under the ADEA, it knew how to do so explicitly. 128 S.Ct. at 2400; *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Lehman v. Nakshian*, 453 U.S. 156, 162-63 (1981) (declining to infer right to jury trial for federal employees suing for age discrimination where Congress expressly recognized right to jury trial under the ADEA but did not do so for federal employer cases).

Given the absence of statutory language articulating a departure from the conventional rule allocating to the employee the burden of persuasion of his or her claims, this Court should not impose a different burden-shifting framework on the ADEA.[16] Instead, the Court should read the ADEA "the way Congress wrote it."[17] *Meacham*, 128 S.Ct. at 2406.

C. This Court should overrule *Price Waterhouse* with respect to its application to the ADEA.

Notwithstanding all of the foregoing, this Court, in *Price Waterhouse*, departed from the conventional rules allocating the burden of persuasion to the employee and engrafted onto Title VII a rule shifting the burden of persuasion to the employer in certain circumstances. More specifically, the Court articulated

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[16] Gross contends it is unfair to require the employee to bear the burden of proof on causation because the employer has superior access to evidence about the cause of its actions. This is an insufficient basis to disregard the text and traditional rule. Liberal discovery rules will permit the employee to probe the employer's evidence on causation. For example, here, Gross took 18 depositions and FBL produced more than 2,000 documents. Tr. 715.

[17] Even the United States agrees the burden should be with the employee, acknowledging, "the ADEA does not diminish what the *plaintiff* must prove: age discrimination," Brief for the United States 11 (emphasis added), and "[t]his Court's precedents accordingly make clear that a *plaintiff* must show that an adverse employment action was actually caused by an age-based motive." *Id.* at 13 (emphasis added).

an exception to the longstanding *McDonnell Douglas* framework for use in cases where substantial or direct evidence demonstrates that the employer considered both permissible and impermissible factors in the decisionmaking process.[18] Under the *Price Waterhouse* framework, once an employee presents such evidence that an impermissible consideration was a substantial factor in the decisionmaking process, the burden of persuasion shifts to the employer to show the absence of causation. 490 U.S. at 244-45, 259-60, 277-78.

Twenty years later, the question of which of three opinions in *Price Waterhouse* is controlling remains unsettled.[19] The four-Justice plurality opinion described a mixed-motive framework as an alternative to the *McDonnell Douglas* pretext framework in cases where "both legitimate and illegitimate considerations played a part in the decision." *Id.* at 247 n.12.

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[18] Gross did not present evidence that demonstrated decisionmakers had any discriminatory animus. Instead, the evidence he presented at trial fit the *McDonnell Douglas* framework. Gross's evidence established a prima facie case. He proved that he was over age 40, that he was qualified for the Claims Administration Manager position and he received favorable performance evaluations, that he was subject to an adverse employment action in that his position was downgraded and a younger woman (in her 40s) was assigned to his desired position. He also presented evidence that other managers in his salary grade experienced demotions in that their salary points and pay grades were reduced.

[19] In *Desert Palace*, this Court declined to decide which *Price Waterhouse* opinion was controlling. 539 U.S. at 98.

Justice O'Connor's concurring opinion, by contrast, set forth an evidentiary standard shifting the burden of persuasion to the employer on the issue of causation only after the employee showed by "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[20] *Id.* at 277-78. Once the employee made such a showing, Justice O'Connor found that the burden of persuasion should be shifted to the employer to prove that it would have made the same decision based upon other, legitimate considerations. *Id.* at 278. Justice White's concurring opinion expressed agreement with Justice O'Connor's analysis that an employee's "burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action," *id.* at 259 (emphasis in original), but Justice White did not expressly embrace Justice O'Connor's language regarding direct evidence of discrimination.

When a fragmented court decides a case and "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members

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[20] The plurality in *Price Waterhouse* did not provide any particulars about when the evidence would be sufficient to use the mixed-motive burden-shifting analysis. Instead, it determined the trial judge's factual finding that sex was a factor considered in the decisionmaking process was not clearly erroneous. 490 U.S. at 255-57. It also indicated that its standard was not significantly different than Justice O'Connor's standard, *id.* at 250 n.13, though Justice O'Connor disagreed, *id.* at 277.

who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Justice O'Connor concurred in the judgment on the most narrow ground in that she would permit burden shifting only when an employee has presented direct evidence that the illegitimate factor played a substantial role in motivating the employer's decision. Applying *Marks*, Justice O'Connor's concurring opinion is the controlling opinion that sets forth the governing rule of law.[21]

At the very least, however, it is clear under *Price Waterhouse* an employee must show substantially more than a prima facie case in order to receive a burden-shifting instruction. Justices White and O'Connor both explicitly said so. 490 U.S. at 259 (White, J., concurring in the judgment) ("And here . . . as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a *substantial* factor in the

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[21] Some courts of appeals expressly recognize that Justice O'Connor's concurring opinion is controlling. *See, e.g., Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 342 n.7 (4th Cir. 2008); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 n.2 (3d Cir. 2002); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc.*, 273 F.3d 30, 35 (1st Cir. 2001); *Haynes v. W.C. Caye & Co., Inc.*, 52 F.3d 928, 931 n.8 (11th Cir. 1995). Others have implicitly done so. *See, e.g., Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004); *Frobose v. Am. Savings & Loan Ass'n of Danville*, 152 F.3d 602, 617 (7th Cir. 1998); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568-69 (2d Cir. 1989).

adverse employment action," at which point the burden shifts) (emphasis in original); *id.* at 278 (O'Connor, J., concurring in the judgment) (employee must show that illegitimate factor "was a substantial factor in the particular employment decision" to receive instruction). The plurality noted that an employee must show more than a prima facie case under *McDonnell Douglas*, but failed to provide further detail, *id.* at 237-38 (saying that although Price Waterhouse contended the burden failed to shift "even if a plaintiff shows that her gender played a part in an employment decision" and Hopkins argued that liability should be found "whenever [an employer] allows [an illegitimate consideration] to play any part in an employment decision," the plurality thought "the truth lies somewhere in between"). The plurality did note its belief that its conception of the required employee's proof was not "meaningfully different" from Justice O'Connor's. *Id.* at 250 n.13.

In the final analysis, however, no matter which opinion in *Price Waterhouse* is controlling, FBL submits that this Court should reconsider and overrule the decision as it applies under the ADEA.[22] Shifting

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[22] In point of fact, to FBL's knowledge, this Court has never held that *Price Waterhouse* applies to the ADEA. Indeed, the closest the Court has come was in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), in which the Court cited *Price Waterhouse* in the process of explaining "[m]ixed motive cases," which the Court then held *McKennon* was not. *Id.* at 360 ("Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of

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the burden of persuasion as to causation to the employer is inconsistent with the ADEA's statutory text and legislative history, with this Court's opinions interpreting the ADEA, and with conventional rules applicable to civil litigation.[23]

In evaluating whether to overrule existing precedent, this Court typically considers the extent to which a governing decision has created an unworkable legal regime, *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2685 (2007), the practical workability of the rule promulgated by the decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the degree of reliance on the rule and the hardship or inequity, if any, that would result from repudiation of the rule, *id.* at 854-55, the extent to

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determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination laws."). There is, however, nothing in the text of the ADEA now and the text of Title VII at the time of *Price Waterhouse* that would justify different treatment. *See, e.g.*, *Thurston*, 469 U.S. at 121 ("interpretation[s] of Title VII" often "appl[y] with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978))).

[23] The end result of *Price Waterhouse* is to make disparate treatment litigation more costly and perilous for employers. Only recently this Court recognized that "putting employers to the work of persuading factfinders . . . makes it harder and costlier to defend than if employers merely bore the burden of production." *Meacham*, 128 S.Ct. at 2406.

which the rule is nothing more than a remnant of an abandoned doctrine, *id.* at 855, and the degree to which circumstances have changed so as to "rob[ ] the old rule of significant application or justification," *id.* All of these factors militate in favor of overruling *Price Waterhouse* as applied to the ADEA.

First, as discussed above, *Price Waterhouse* is unsupported by the ADEA's statutory text or the common law rules applicable to civil litigation that have traditionally underpinned that text's interpretation. This was no less true with respect to the text of Title VII in effect at the time *Price Waterhouse* was decided and that was at issue in that case. In order to justify the shift in burden, the plurality, Justice White, and Justice O'Connor all looked to what they believed was the "intent of Congress and the purposes behind Title VII." 490 U.S. at 263 (O'Connor, J., concurring in the judgment); *see also id.* at 239-42, 248 (plurality); *id.* at 260 (White, J., concurring in the judgment). Justice O'Connor in particular seemed to think that, once the employee showed direct evidence of discriminatory motive, the employer should be viewed with a jaundiced eye. *Id.* at 265-66 (O'Connor, J., concurring in the judgment) (once direct evidence has been proffered, "[t]he employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination"). Even though Justice O'Connor's test has the salutary feel of rough justice, nothing in Title VII at

the time, and nothing in the ADEA today, supports her decision. As this Court held in *Meacham*, the Court "ha[s] to read [the ADEA] the way Congress wrote it." 128 S.Ct. at 2406.

Second, as noted above, the opinion was splintered and has been difficult to interpret.[24] As a result, and as this Court has recognized, it is not wholly clear what the rule in *Price Waterhouse* is. *See Desert Palace*, 539 U.S. at 98. It cannot be the case that revisiting the effect or reach of a case that was unclear from its inception, and that this Court has said explicitly is uncertain, could be cause for complaint from those attempting to apply it. In fact, overruling *Price Waterhouse* would bring needed clarity back to this area of the law rather than upset any settled expectations.

Third, courts have found *Price Waterhouse* hard to implement in the jury trial context.[25] Applying

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[24] One commentator has noted that Justice O'Connor's controlling concurrence, while widely adopted, has proven "practically unworkable and theoretically unprincipled. . . . " Jamie Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 532 (2008). *See also* Robert Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. Pa. J. Lab. & Emp. L. 303 (2003).

[25] *See, e.g., Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (recognizing the challenge of trying to instruct jurors on the mixed-motive instruction while noting it would be uncommon for a plaintiff to make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence);

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Price Waterhouse to disparate treatment claims cultivates unpredictability for litigants in preparing for and presenting cases at trial. *See* 490 U.S. at 291-92 (Kennedy, J., dissenting) ("Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under . . . the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials."). Procedurally, *Price Waterhouse* involved an appeal of a judgment rendered after a bench trial. In the jury trial context, however, the framework is impractical and imprecise. Parties need to have some understanding as to what jury instructions a court will use well before exchanging witness and exhibit lists, offering opening statements, or presenting evidence at trial. The dual framework does not provide certainty with respect to how a trial court will instruct the jury on the elements of proof and the parties' respective burdens. Parties must wait until the eleventh hour, on the eve of closing argument, to

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Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 186 (2d Cir. 1992) (discussion of confusion *Price Waterhouse* caused in the ADEA jury trial context because *Price Waterhouse* involved a bench trial under Title VII); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (describing the task of devising a *Price Waterhouse* jury instruction as "the murky water" of shifting burden in discrimination cases); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("As Justice Kennedy observed in his *Price Waterhouse* dissent, formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.").

find out whether the trial court has identified the case as falling within the single motive or mixed-motive framework.

This case illustrates that uncertainty and its costs. Gross and FBL litigated a classic *McDonnell Douglas* case that Gross's own counsel characterized as turning not on a "smoking gun," but rather on "circumstance[ ]." Tr. 740, 746. Only after the close of the evidence was FBL faced with the specter of a "mixed-motive" instruction with its shifting burden of persuasion.

Fourth, there is no practical distinction between a single motive and a mixed-motive case, so *Price Waterhouse* has no functional purpose. If an employee has "direct" evidence of discrimination, such as a facially discriminatory policy, the conventional method of allocating the burden of proof and persuasion does not impair the employee in presenting his or her case. *See, e.g., Thurston*, 469 U.S. at 122. The employee simply offers the evidence, which both establishes a prima facie case and satisfies the ultimate burden of persuasion. This likely explains why the *McDonnell Douglas* framework has always contemplated that a disparate treatment case may be characterized as single motive or mixed-motive. In *Burdine*, for example, the Court recognized that under Title VII a disparate treatment employee may succeed "directly by persuading the [trier of fact] that a discriminatory reason *more likely* motivated the employer. . . ." 450 U.S. at 256 (emphasis added). Clearly, the Court was contemplating that in the first

set of circumstances it was *less likely* another, nondiscriminatory reason caused the employer's decision.

Fifth, Congress, by enacting the 1991 Act, abandoned *Price Waterhouse* in the very context in which it first arose. Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991). More specifically, Congress amended Title VII to affirm that the conventional rules of civil litigation govern, and the burden of persuasion always rests with the party making the claim.[26] One portion of the 1991 Act, now contained in 42 U.S.C. § 2000e-2(m), created an alternative basis for imposing liability, stating:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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[26] H.R. Rep. No. 102-40(II) (1991), states in part that

> In *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position.

Pub. L. No. 102-166, § 107. The 1991 Act went on to state, for purposes of Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Pub. L. No. 102-166, § 104. In other words, Congress expressly returned the burden of persuasion to the employee on all elements of Title VII claims.[27]

Finally, this Court itself recently passed on the opportunity to apply *Price Waterhouse* to the ADEA in *Reeves v. Sanderson Plumbing Products, Inc.*, which involved a disparate treatment age discrimination claim. 530 U.S. at 133. At trial, the employee presented evidence that the decision at issue was motivated by permissible and impermissible considerations. In particular, the employee presented testimony that the manager who made the decision to fire him had told him he "was so old [he] must have come over on the Mayflower" and on one occasion said that he "was too damn old to do [his] job." 530 U.S. at 151. The

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[27] As noted, the 1991 Act made it easier for employees to establish employer liability for unlawful discrimination. *Price Waterhouse* imposed liability only if the employer was unable to satisfy its burden of persuasion as to causation. Under the 1991 Act amendments, an employer is liable after an employee shows the presence of an unlawful motive. An employer found liable under § 2000e-2(m) may limit remedies, but may not avoid liability, if it "demonstrates" it would have made the same decision absent the impermissible factor, formally making the "same decision" defense an affirmative one, at least as to remedy. Pub. L. No. 102-166, § 107. Nevertheless, what is relevant here is the 1991 Act's return of the burden of persuasion as to causation to the employee.

employer presented evidence that in making the decision to fire the employee, it was motivated by legitimate considerations, including the employee's conduct in falsifying company pay records. Despite the presence of "direct" evidence of impermissible considerations and other evidence of permissible considerations, or the presence of a quintessential "mixed-motive" case, the Court applied the *McDonnell Douglas* framework rather than the *Price Waterhouse* mixed-motive framework and found for the employee.

The Court should adopt a single framework for disparate treatment claims that requires the employee to bear the burden of persuasion on all elements of the claim, including showing that age was the outcome determinative factor in the adverse employment action at issue.[28] Under the *McDonnell*

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[28] For all of the reasons discussed, adopting Gross's proposed *Mt. Healthy City School District Bd. of Education v. Doyle* framework would not resolve the question presented. 429 U.S. 274 (1977). Additionally, *Mt. Healthy* is of doubtful applicability here because that case involved a constitutional tort, not a statutory disparate treatment claim. *See Washington v. Davis*, 426 U.S. 229, 238-39 (1976). Moreover, reliance on *Mt. Healthy* is not useful in identifying the threshold evidentiary standard an employee must satisfy before a court should shift to the employer the burden of persuasion as to causation. In *Mt. Healthy*, the plaintiff presented evidence of a written admission that his exercise of First Amendment rights was a factor in the defendant's decision not to rehire him. *Id.* at 281-84. *Mt. Healthy* therefore did not attempt to define "substantial" factor or to articulate the threshold evidentiary showing a plaintiff must

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Douglas framework, once an employee presents a prima facie case of discrimination, the burden of production shifts to the employer to show a legitimate, non-discriminatory reason for the adverse employment decision. *St. Mary's Honor Ctr.*, 509 U.S. at 506-07. If the employer succeeds in carrying its burden of production, the *McDonnell Douglas* framework drops out of the picture, and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him or her]' " because of the impermissible factor. *Id.* at 510-11.

The Court should overrule *Price Waterhouse* as it applies under the ADEA and hold that the employee

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make before the court will instruct a jury the burden of proving causation should be placed on the defendant.

Likewise, *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), is inapposite. In that case, the Court simply deferred to the NLRB's interpretation of the National Labor Relations Act, a law that does not contain language similar to 29 U.S.C. § 623(a)(1). The NLRB adopted a burden-shifting approach in cases alleging interference with rights guaranteed under the NLRA. In fact, the Court clearly stated that it would have deferred to the agency had it chosen not to impose a shifting burden. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401-04 ("We are unprepared to hold that [the Board's burden-shifting approach] is an impermissible construction of the Act. '[T]he Board's construction here, while it may not be required by the Act, is at least permissible under it' ") (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975)).

The issue in this case is whether the Court should read such a requirement into a federal statute. FBL contends it should not. *See Meacham*, 128 S.Ct. at 2406.

retains the burden of persuasion on all elements of a claim of disparate treatment. Because a burden-shifting instruction was erroneously given here, the decision of the court of appeals should be affirmed and the case remanded for a new trial.

II. IF *PRICE WATERHOUSE* IS RETAINED, AN EMPLOYEE CLAIMING DISPARATE TREATMENT AGE DISCRIMINATION MUST MAKE, AT THE LEAST, A SUBSTANTIAL SHOWING OF UNLAWFUL MOTIVATION TO JUSTIFY SHIFTING THE BURDEN OF PERSUASION ON CAUSATION TO THE EMPLOYER.

If the Court decides that *Price Waterhouse* remains good law, then *Price Waterhouse* should continue to govern cases under the ADEA. Gross's arguments are wholly inconsistent with *Price Waterhouse*. He argues in essence that once an employee makes a prima facie case under the *McDonnell Douglas* framework or suggests that the employer's explanation for its adverse action is pretextual, the burden of persuasion on causation shifts to the employer. This position is untenable for a multitude of reasons.

A. *Price Waterhouse* articulated a rule shifting the burden of persuasion to the employer only in extraordinary cases.

The Court in *Price Waterhouse* considered a case in which the employee was denied entrance into the partnership of the accounting firm Price Waterhouse. In addition to her prima facie case under *McDonnell Douglas*, the employee also presented a mass of evidence that the decisionmakers within the firm labored under sexist stereotypes. This evidence ranged from comments made by those reviewing the employee's candidacy to the post-determination explanation that the employee received.[29] As noted above, in a splintered decision, this Court held that in such circumstances, the burden of persuasion switched to the employer to prove that it would have made the same decision irrespective of its consideration of the impermissible factor.

Although this Court has not so held, for the reasons provided above, FBL believes that Justice O'Connor's concurring opinion states the holding of the Court. *See supra* at 28-29. In order to receive a burden-shifting instruction, a "plaintiff must show by

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[29] For example, one partner described the female employee as "macho"; another stated she "overcompensated for being a woman"; and yet another suggested she "take a course at charm school." 490 U.S. at 235. The employer advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

direct evidence that an illegitimate criterion was a substantial factor in the decision."[30] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in the judgment). The court of appeals here correctly held that Gross failed to satisfy this standard. But even assuming that Justice O'Connor's opinion is not controlling, *Price Waterhouse* nonetheless requires that an employee present *substantial* evidence of discriminatory intent for the burden to shift to the employer. *See supra* at 29-30.

Because the burden shifting authorized in *Price Waterhouse* represented a significant departure from the text of Title VII, the general precepts of all civil litigation, and precedents with respect to the placement of the burden of persuasion, the Court carefully limited its reach. As Justice O'Connor explained, the mixed-motive framework was to "be viewed as a supplement to the careful framework established by" *McDonnell Douglas* and *Burdine*. 490 U.S. at 261-62. Under circumstances where the employee presented substantial and direct evidence of discrimination, Justice O'Connor opined that it would be appropriate to administer "the strong medicine" of shifting to the

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[30] Although Gross repeatedly argues there should be no elevated evidentiary standard to prove a disparate treatment age discrimination claim, that is not the issue here. The issue is what evidentiary threshold a court should require an employee to satisfy before shifting the burden of persuasion on causation to the employer. For this reason, the term "circumstantial" is not once used in the challenged Eighth Circuit decision. Pet. App. 3a-12a.

employer the burden of persuasion on the issue of causation, but not under others. *Id.* at 262.

The objectives of the ADEA do not require a broader application of burden shifting. Workplace anti-discrimination laws are intended to maintain a careful balance between employer prerogatives and freedom of choice and employee's rights to be free from unlawful discrimination. *See Price Waterhouse*, 490 U.S. at 242-43; *McKennon*, 513 U.S. at 361; *McDonnell Douglas*, 411 U.S. at 800-01. The ADEA recognized the importance of this balance; indeed, one of its stated purposes is to *help* employers. 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter . . . to help employers and workers find ways of meeting problems arising from the impact of age on employment."). Gross's policy argument that the Court should make it easier for age discrimination plaintiffs to prove their claims at trial is "more properly addressed to legislators," not the Court. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

If *Price Waterhouse* is retained, its requirement of a heightened evidentiary showing before burden shifting should also be retained. This departure from the ordinary conduct in civil litigation – in which the employee retains the burden of persuasion on all elements of his or her cause of action – should be permitted only in extraordinary circumstances.

Justice O'Connor's concurring opinion does not separate circumstantial evidence from direct evidence.

Instead, Justice O'Connor required that the evidence relate directly to the challenged decision. *Id.* at 277 (employee must satisfy evidentiary threshold by showing "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion *in reaching their decision*") (emphasis added). Indeed, as the United States explained in its brief *amicus curiae* in *Desert Palace*, "[v]irtually all of the courts of appeals have interpreted Justice O'Connor's reference to 'direct evidence' to require, at a minimum, that the plaintiff's evidence *directly relate to the decision-making process* that led to the adverse employment action at issue." Brief for the United States as Amicus Curiae Supporting Petitioner, p. 10, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (No. 02-679) (citing cases) (emphasis added).[31]

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[31] *See King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009) ("[d]irect evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action"); *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (plaintiff must demonstrate through direct or circumstantial evidence the alleged unlawful motive "actually relates to the question of discrimination in the particular employment decision," with the qualification that circumstantial evidence must be tied "directly" to the retaliatory motive); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) (plaintiff may use direct or indirect method of proof to show disparate treatment discrimination, describing "[t]he focus of the direct method of proof thus is . . . whether the evidence 'points directly' to a discriminatory reason for the employer's action."); *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) ("To be 'direct' for purposes of the *Price Waterhouse*

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FBL acknowledges that the precise meaning of the phrase "direct evidence" has been the subject of some debate among the courts of appeals, as the collection of cases in the United States' brief in *Desert Palace* reflects. The critical point, however, is that the *Price Waterhouse* requirement of substantial and direct evidence in order to shift the burden of persuasion on an element of an employee's cause of action serves an indispensable function if the burden is to be shifted at

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test, evidence must be sufficient to allow the jury to find that the decision makers placed a substantial negative reliance on the plaintiff's age in reaching their decision. . . . This means [the plaintiff] must produce evidence of discriminatory attitudes about age that were causally related to the decision to fire her"); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163-64 (4th Cir. 2004) (mixed-motive direct evidence framework requires "at most, evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision"); *Melendez-Arroyo*, 273 F.3d at 35 (direct evidence consists of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision"); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997) (plaintiff may use direct or indirect evidence to support a mixed-motive claim, clarifying that " '[d]irect evidence' for these purposes is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action"); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) ("to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment"). *But see Rowan*, 360 F.3d at 548 (distinguishing between direct and circumstantial evidence).

all. The requirement must be interpreted to have teeth.

Gross and the United States do not truly join issue with any of the foregoing. Instead, they argue that the nature of the heightened standard imposed by *Price Waterhouse* – the requirement of substantial or direct evidence – makes no sense, and that this Court has never adopted a test that turns on an artificial distinction between the probative value of direct and circumstantial evidence for proving one's claim. Petitioner's Brief 11, 13, 17; Brief for the United States 13, 15-16. Similarly, Gross and the United States argue that this Court's rejection of a direct evidence standard for proving willfulness in *Hazen Paper* suggests the Court should not impose any evidentiary threshold for burden shifting. Petitioner's Brief 24-25; Brief for the United States 16-17. These arguments are of a piece and are equally misplaced.

FBL does not dispute that an employee may rely on direct or circumstantial evidence to *prove* a disparate treatment age discrimination claim, just as an employee may use direct or circumstantial evidence to *prove* willfulness. The real issue is when, if ever, the burden of proving causation, or lack thereof, should *shift* to the employer in an ADEA case, particularly in those cases in which it matters most: when the evidence is in equipoise. Petitioner's Brief 47. Gross and the United States avoid this issue, failing even to articulate a standard for burden shifting other than that *some* evidence is sufficient.

Petitioner's Brief 27-30; Brief for the United States 11-12, 20-24. Under any reading, *Price Waterhouse* requires something more than *some* evidence to shift the burden of persuasion on causation to the employer.

Since Gross did not present such evidence, the court of appeals correctly found that the burden-shifting jury instructions were unlawful. *See infra* at 51-56.

B. Although Congress eliminated the application of *Price Waterhouse* to Title VII in the 1991 Act, that portion of the 1991 Act did not apply to the ADEA.

Gross and the United States argue the holding of *Desert Palace* should be engrafted onto the ADEA.[32]

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[32] Interestingly, in *Desert Palace* itself, the United States took the opposite position as to Title VII. It argued that the 1991 Act had not displaced *Price Waterhouse's* holding that an employee should be required to adduce direct evidence of discriminatory intent to invoke a jury instruction under § 2000e-2(m), and it further stated that

> the better reading of *Price Waterhouse* is that direct evidence means non-circumstantial or non-inferential evidence. In other words, in order to justify shifting the burden of persuasion to the defendant, the plaintiff must submit evidence that, without resort to inferences or presumptions, establishes that race or gender was a substantial, motivating factor in the employer's decision.

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They necessarily assume that *Desert Palace* means *Price Waterhouse* was overruled not only as it applied to Title VII, but also as applied to the ADEA. This is plainly wrong. *Desert Palace* interpreted specific provisions of the 1991 Act and found that the Act statutorily overruled *Price Waterhouse* in Title VII cases. But Congress deliberately chose not to apply its new provision to ADEA cases, and thus the analysis of *Desert Palace* is not applicable here.

Specifically, as noted above, the 1991 Act created a new Title VII claim, imposing liability on an employer when an employee "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice, even though other factors also motivated the practice." Pub. L. No. 102-166, § 107 (now contained in 42 U.S.C. § 2000e-2(m)).

In *Desert Palace*, this Court examined the effect of the aforementioned language in the 1991 Act on *Price Waterhouse's* direct evidence requirement under Title VII. 539 U.S. at 92. Not surprisingly, given the clear language of the 1991 Act, and the legislative history surrounding its enactment,[33] the Court held a Title VII plaintiff presenting a claim under § 2000e-2(m) could establish liability merely by showing that an impermissible factor motivated the decision at

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Brief for the United States as Amicus Curiae Supporting Petitioner, p. 10, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (No. 02-679).

[33] *See supra* at 36-37.

issue and without adducing any direct evidence to that effect. *Id.* at 101-02.

Contrary to Gross's and the United States' contentions in this case, *Desert Palace* and the relevant provisions of the 1991 Act had no effect on claims arising under the ADEA. As an initial matter, the language of the 1991 Act at issue in *Desert Palace* applies by its terms only to Title VII. 42 U.S.C. § 2000e-2(m). There is no similar language in the ADEA. Moreover, where Congress desired to amend the ADEA in the 1991 Act, it did so explicitly. For example, the 1991 Act amended the ADEA by conforming its limitations period to corresponding changes to Title VII. Pub. L. No. 102-166, § 115. Of equal importance, the legislative history reflects that Congress considered the application of specific cases to ADEA claims and specified cases that it was expressly disapproving for application under the ADEA. For example, in the House Report accompanying the bill, Congress referenced explicitly the "danger that *Lorance v. AT&T Technologies* . . . will continue to be applied under the ADEA, if the statute of limitations is changed in Title VII but not in the ADEA," and it amended the language of the ADEA to prevent such application. H.R. Rep. No. 102-40(I), at 97 (1991). Congress's express treatment of, and amendments to, the ADEA in the 1991 Act make clear that Congress's failure to apply Title VII's new provision to ADEA claims was a deliberate choice. *Price Waterhouse* remains governing as to ADEA claims, and *Desert Palace* – which construes a 1991 Act provision that

applies only to Title VII claims – is not applicable here.[34] *Russello*, 464 U.S. at 23; *Lehman*, 453 U.S. at 162-63.

This analysis is confirmed by this Court's recognition that it is the pre-1991 Act Title VII regime that is analogous to the ADEA and that governs claims arising under the ADEA. *See, e.g.*, *Smith*, 544 U.S. at 240 ("*Ward's Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."); *see also Meacham*, 128 S.Ct. at 2404 (noting

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[34] The United States contends that Congress could not have ratified *Price Waterhouse*'s application to ADEA claims in the 1991 Act because "there was no settled direct evidence requirement" when Title VII was amended in 1991. Brief for the United States 24. This argument fails for two reasons. First, Congress's deliberate decision not to extend the amendments to Title VII to the ADEA is, in effect, a ratification of the application of *Price Waterhouse* to the ADEA. Second, several appellate decisions addressed the application of *Price Waterhouse* to the ADEA before Congress passed the 1991 Act. *See Bay v. Times Mirror Magazine, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991); *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191-92 (2d Cir. 1991); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 131 (1st Cir. 1991); *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686 (7th Cir. 1991); *Visser*, 924 F.2d at 650; *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990); *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1518-19 (11th Cir. 1990); *Young v. City of Houston, Tex.*, 906 F.2d 177, 181-82 (5th Cir. 1990); *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990); *Blake v. J.C. Penney Co., Inc.*, 894 F.2d 274, 278 (8th Cir. 1990); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371 n.4 (2d Cir. 1989); *Grant*, 880 F.2d at 1568-69.

that *Smith v. City of Jackson* said "a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact . . . is the employee's burden under both the ADEA and the *pre-1991 Title VII*") (emphasis added). For the reasons noted above, FBL believes the Court should do so in this case once again.

C. The evidence presented at trial did not support a mixed-motive instruction and the corresponding shift of the burden of persuasion to FBL to show the absence of causation.

At base, Gross argues that the burden of persuasion should switch to the employer in an ADEA case when an employee presents evidence adequate to establish a *McDonnell Douglas* prima facie case or suggests that the employer's explanation for its adverse action is pretextual. This argument overlooks, and contradicts, more than 30 years of opinions endorsing, and explaining the purpose of, the ADEA and the role of the *McDonnell Douglas* framework in determining liability.

From the inception of this lawsuit, Gross attributed his demotion to "no apparent reason" and from this, concluded it must have been age because of the "lack of any other reason." Complaint ¶¶ 13, 15; J.A. 6. In closing argument, Gross's trial counsel conceded there was no evidence to show that the challenged

decision involved impermissible motives.[35] Instead, he asked the jury to disbelieve FBL and find he was demoted because of age on the theory that there was no other explanation for the demotion.[36] Gross's

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[35] Gross's counsel acknowledged there was no direct evidence of age discrimination, by any definition

> [O]ne of the things that you've been told is that all these people didn't see discrimination, they didn't hear discrimination. And how do you find discrimination? And how you find it here, when people are unwilling to admit it, is that you look at the actions. You look at the facts. You look at the circumstances. You look at the end result. Tr. 740.
>
> There was not a shred of evidence of – you know, piece of paper that you could see that said I need to put Jack in this position because he's too old, his time has passed, and put the old guy out to pasture. You didn't see that. But you don't have to see that to find discrimination. You don't have to see that. Tr. 741.
>
> So the absence of a piece of paper, the absence of an admission by one person that said, oh, yeah, I heard Andy say Jack is getting too old, or Barb Moore or Steve Wittmuss, they didn't say that and you don't have to hear that. You don't have to see it to know that what happened to him was discrimination. Tr. 741.
>
> And it's important for you to remember when you go back into that jury room, again, that you don't have to have that smoking gun. You don't have to have the admission. None of these people coming in and saying no doesn't mean that you shouldn't find for Jack Gross. Tr. 746.

[36] Gross's counsel argued

> [W]e know that age was a motivating factor because of the incredible reasons that Farm Bureau has given to support the demotion that they couldn't back up, that

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counsel conceded the absence of direct evidence of discrimination at a post-trial hearing on FBL's Renewed Motion for Judgment as a Matter of Law. Appellant's Appendix 596. Additionally, the district court recognized Gross did not present substantial or direct evidence of age discrimination at trial.[37]

Gross's effort to justify the mixed-motive instruction, under these facts, reveals that he is in effect asking this Court to place determinative weight on the prima facie case from *McDonnell Douglas*. That prima facie case is too weak a reed to bear such weight. This Court crafted the *McDonnell Douglas* framework as a means of establishing an order for the presentation of proof. *St. Mary's Honor Ctr.*, 509

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the facts of this case simply don't support. We also know that age was a factor in the demotion because there simply was no other reason to demote Jack Gross. Tr. 694.

And when you think about it, there is no explanation other than age for the demotion. Tr. 701.

[37] The district court stated in a post-trial order:

Here, the court finds that while the jury ultimately returned a verdict in favor of plaintiff on his claims of age discrimination, neither liability nor damages were "fairly certain." Defendant presented evidence of a legitimate, nondiscriminatory reason for demoting plaintiff and, in the absence of any direct evidence of discrimination, the jury had to rely on circumstantial evidence and inferences of discrimination to conclude that defendant discriminated against plaintiff based on his age.

Appellee's Appendix 174.

U.S. at 506. For that reason, this Court has noted that the burden of establishing a prima facie case of disparate treatment is "not onerous," *Burdine*, 450 U.S. at 253, and a prima facie case "is not the equivalent of a factual finding of discrimination," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978).

Moreover, Gross's proposed standard would permit a jury to find an employer liable upon an employee's mere suggestion of mendacity by an employer, regardless of whether age motivated the decision. Indeed, Gross now justifies the mixed-motive instruction with that very contention, arguing "[i]f as to even *one* of those proffered justifications the jury concluded that it was a phony explanation, the jury could have inferred . . . that age was a motivating factor." Petitioner's Brief 48 (emphasis in original). This Court rejected the standard Gross proposes in *St. Mary's Honor Center*. 509 U.S. at 519.

Nor would Gross's proposed test comport with Congress's purposes in enacting the ADEA. It simply sets too low a standard for shifting the burden of persuasion on an element of the employee's claim. Employers may consider factors that readily correlate with age, such as years of service or salary, without violating the ADEA. *See Ky. Ret. Sys.*, 128 S.Ct. at 2369-70 (holding that employer may consider pension status even when correlated with age); *Hazen Paper*, 507 U.S. at 609-11. Nevertheless, Gross almost solely identified as evidence of age discrimination just this

type of factor, including years of service, voluntary early retirement incentive packages, and salary.[38] Shifting the burden of persuasion based on such evidence allows an inference of unlawful discrimination to arise from employers' wholly legitimate personnel decisions.[39]

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[38] FBL asked the district court to instruct the jury regarding the governing law to avoid such confusion. Appellant's Appendix 21 ("Defendant is entitled to make its own subjective personnel decisions, absent intentional age discrimination, even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority"). Tr. 673-75. FBL objected to the district court's refusal to do so.

[39] Gross's argument that FBL could have overcome the error in the instructions by showing that it would have made the same decision absent consideration of Gross's age is unavailing. FBL's trial strategy was based on Eighth Circuit precedent recognizing that a mixed-motive instruction would be improper here because Gross did not have substantial or direct evidence of intentional age discrimination. Neither discovery nor the material facts identified by Gross in resisting FBL's Motion for Summary Judgment gave FBL any reason to expect Gross to present substantial or direct evidence of age discrimination at trial. In fact, Gross offered no such evidence. The district court informed the parties of its final decision to use a mixed-motive instruction after the close of the evidence. The jury would surely have noticed (to the prejudice of FBL) if FBL changed its strategy between opening statement and closing argument. Gross's argument that an employer need only present argument regarding the same-decision defense to avoid liability overlooks the reality of trial by jury and the substantial risk that a jury will interpret an employer's same-decision argument as an implicit admission that an impermissible factor played a role in the adverse decision at issue.

The evidence at trial simply did not contain facts sufficient to support a finding that age was a substantial motivating factor in Gross's demotion. On this record, the district court's jury instructions improperly charged the jury because the instructions shifted the burden of proving the absence of causation to FBL. The court of appeals correctly reversed and remanded for a new trial.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for a new trial.

Respectfully submitted,

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REPLY BRIEF

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In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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I. INTRODUCTION

This Court granted certiorari to decide whether direct evidence is required to obtain a mixed motives instruction in a non-Title VII case. (Petition, i). Respondent devotes much of its merits brief to a different issue, urging this Court to overrule *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

This Court has repeatedly declined to address an issue of such importance when it is raised for the first time in respondent's merits brief. For example, in *Alabama v. Shelton*, 535 U.S. 654 (2002), the Court refused to entertain respondent's suggestion that the Court overrule its earlier decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979).

> We do not entertain this contention, for Shelton first raised it in his brief on the merits. "We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate."

535 U.S. at 661 n.3 (quoting *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999)). In *South Central Bell* this Court declined on similar grounds to consider a suggestion that it overturn "our longstanding negative Commerce Clause doctrine," noting that it was the Court's "practice" not to entertain such arguments when they had not been raised in the brief in opposition. 526 U.S. at 171.

The considerations articulated in *Shelton* and *South Central Bell* apply with particular force in the instant case. Respondent's brief in opposition, far from suggesting that *Price Waterhouse* should be reconsidered, embraced both that decision and its application to ADEA cases.[1] Because respondent did not earlier indicate that it would challenge the holding in *Price Waterhouse*, the United States was deprived of an opportunity to address that important issue in its brief. A decision to overrule the decision in *Price Waterhouse* would affect not only the ADEA but also the large number of federal and state[2] laws that since 1989 have been construed to embody the allocation of the burden of proof set out in *Price Waterhouse*. The decision in *Price Waterhouse* should not be revisited without affording to parties affected by a potential change in the interpretation of those other laws – including the attorneys general of the states involved – an opportunity to make their views known to this Court.

II. DIRECT EVIDENCE IS NOT REQUIRED TO OBTAIN A MIXED MOTIVE INSTRUCTION

(1) Respondent relies largely on Justice O'Connor's 1989 concurring opinion in *Price Waterhouse* to support its proposal for a direct evidence requirement.

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[1] Br. Opp. 7, 8-17.

[2] See brief appendix.

This argument ignores the significance of this Court's subsequent 2003 decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Desert Palace construed the amendments to Title VII contained in the 1991 Civil Rights Act. Those amendments, respondent properly notes, did not modify the ADEA. (R.Br. 49). But this Court's decision in *Desert Palace* did not rest exclusively on the language of the 1991 Act. It also set forth a more general principle of statutory construction – that the courts should not require any "heightened showing" in ordinary civil litigation unless Congress itself has imposed such a standard. 539 U.S. at 99. (Pet. Br. 21-22). The unanimous opinion endorsing this presumption in favor of the conventional rule for civil cases was joined both by Justice O'Connor and by the three members of the Court who had dissented in *Price Waterhouse*.

It is *Desert Palace* which thus establishes the principles of interpretation that governs the construction of the ADEA. Respondent correctly acknowledges that the ADEA itself has no language authorizing the use of any heightened evidentiary standard. (R.Br. 18). The absence of such language is dispositive. Whatever the implications of the various *Price Waterhouse* opinions might have been had the instant case arisen in 1989, they have been overtaken by subsequent judicial events. In the wake of the *Desert Palace* rule any heightened showing requirements must be based on specific statutory language; further exegesis of the treatment of direct evidence in the

Price Waterhouse opinions is thus of little significance.

Justice O'Connor's concurring opinion in *Price Waterhouse*, calling for use of a direct evidence requirement, does not constitute the holding of the Court. Respondent erroneously relies on the statement in *Marks v. United States*, 430 U.S. 188, 193 (1977), that when

> no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

But this statement in *Marks*, like the opinion it cited in *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart J, Powell J., and Stevens, J.), concerned the method for determining the holding of the Court in a case in which *five* members of the Court concurred in the judgment. But in *Price Waterhouse six* members of the Court concurred in the judgment. When, as in *Price Waterhouse*, five of the six members of the Court did agree on a standard – in that case a standard not requiring direct evidence – it is simply irrelevant whether a sixth member, who favored that requirement, also concurred in the judgment. (See U.S.Br. 22).

Even if Justice O'Connor's opinion is not controlling, respondent argues,

> *Price Waterhouse* nonetheless requires that an employee present *substantial* evidence of

> discriminatory intent for the burden to shift to the employer. *See supra* at 29-30.

(R.Br. 42) (Emphasis in original). Pages 29-30 of respondent's brief quote from the separate concurring opinions of Justice O'Connor and Justice White, both of whom required the plaintiff to show that an unlawful purpose was "a substantial factor in the" disputed employment action. See 490 U.S. at 259 (White, J., concurring[3]), 278 (O'Connor, J., concurring). But there is a manifest difference between "substantial evidence" and "substantial factor." "Substantial evidence" refers to the weight of the evidence offered to establish a given fact, as compared to conclusive evidence or a mere scintilla of evidence. "Substantial factor" refers to the importance of a consideration in the decisionmaker's decision, as compared to an overwhelming or trivial factor. A plaintiff might establish by a preponderance of the evidence that age was a substantial factor, or show by overwhelming evidence that age was a very minor factor.

Respondent asserts that the plurality in *Price Waterhouse* "did not provide any particulars about when the evidence would be sufficient to use the mixed motive burden-shifting analysis." (R.Br. 28

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[3] Justice White's concurring opinion cannot be read as treating "substantial factor" as different (or more stringent than) "a motivating factor"; he regarded the two phrases as synonymous. 490 U.S. at 259 ("'substantial factor' – or, to put it in other words, ... a 'motivating factor'") (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)).

n.20). That is not correct; the plurality specifically rejected the suggestion by Price Waterhouse that direct evidence should be required (490 U.S. at 257), and emphasized that there was no "limitation on the possible ways of proving that [gender] played a motivating role in an employment decision." 490 U.S. at 251-52 (quoted in *Desert Palace*, 539 U.S. at 92). Respondent describes the plurality as indicating that "its standard was not significantly different than Justice O'Connor's." (R.Br. 28 n.20 (citing 490 U.S. at 250 n.13)). That statement is correct only in a sense not relevant to the instant case. Footnote 13 of the plurality opinion, which respondent cites, refers to the plurality's standard regarding *what* a plaintiff must prove (that an unlawful purpose was one of the defendant's reasons) not to the plurality's standard as *how* that showing could be made (by non-direct as well as direct evidence).

Respondent repeatedly suggests that direct evidence must be required because the only alternative would be to compel an employer to show that it would have taken the action in question for non-discriminatory reasons in any case in which the plaintiff merely established a prima facie case. (R.Br. 40, 51, 53). Respondent insists the brief for petitioner urges, "in essence," that a mere prima facie case would have such effect. (R.Br. 40). We do not advance that position in essence, or in any other sense. The very first words in the argument in our opening brief were precisely to the contrary: "[i]n a disparate treatment case under the ADEA the plaintiff must *establish* that age was a motivating factor in the

employment decision at issue." (Pet. Br. 14 (emphasis added); see Pet. Br. 43 (burden is on employer only "where a plaintiff establishes that an impermissible purpose was a motivating factor in an adverse decision)). The jury instructions made clear to the jury that the plaintiff was required to prove "by the preponderance of the evidence ... [that] the plaintiff's age was a motivating factor in defendant's decision to demote plaintiff." (J.App. 9-10).

Importing a direct evidence requirement into the ADEA would significantly complicate the litigation of discrimination claims, because two quite different causation instructions might be necessary in a case involving claims under both the ADEA and some other law or constitutional provision. A Title VII claim is clearly governed by the *Price Waterhouse* burden allocation, now codified (with some modification) in the 1991 Civil Rights Act, and the decision in *Desert Palace* makes clear that direct evidence is not required under Title VII to meet the plaintiff's burden of showing that an impermissible motive was a motivating factor. Constitutional claims, including claims of unconstitutional discrimination in employment by state and local government bodies, are governed by the same allocation of burdens, which derive from this Court's decision in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 286 (1977). Respondent does not challenge the decision in *Mt. Healthy*, which contains no direct evidence requirement. (R.Br. 38 n.28.) It is common for a single action to combine claims under the ADEA with claims under Title VII or with constitutional

claims. In such a case, if the ADEA (unlike Title VII or constitutional claims) required direct evidence,

> the trial judge would face the challenge of trying to make lay jurors understand that "because of" means one thing as applied to the first claim and another thing as applied to the other claims. It is doubtful that Congress would want such a result, and we are reluctant to put trial judges in this predicament.

Watson v. Southeastern Pennsylvania Transp. Authority, 207 F.3d 207, 220 (3d Cir. 2000) (opinion by then Judge Alito).

(2) It is not entirely clear which heightened proof requirement respondent is asking this Court to adopt.

Respondent sets out a variety of heightened standards: "direct evidence,"[4] "substantial evidence,"[5] "substantial showing,"[6] "direct *or* substantial evidence,"[7] "direct *and* substantial evidence,"[8] and "[p]ut differently, ... evidence that would allow the factfinder to conclude that discrimination was the proximate cause of the employer's action."[9] These standards are different in kind; "direct evidence" refers to a particular

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[4] R.Br. 14, 15, 29-30; see R.Br. 43, 44, 45, 47, 49, 53.

[5] R.Br. 42.

[6] R.Br. 14, 40.

[7] R.Br. 1, 2, 16, 27, 46, 55 (emphasis added).

[8] R.Br. 2, 42, 45 (emphasis added).

[9] R.Br. 17.

kind of evidence, while "substantial evidence" refers to the degree of probativeness of the evidence.

"Substantial evidence" itself is a phrase of many meanings. Congress has used that phrase in literally hundreds of statutes, although not – of course – in the ADEA itself.[10] As used by respondent, "substantial evidence" has a particularly demanding meaning, because respondent explains that it can be satisfied only in "extraordinary" cases and circumstances. (R.Br. 41, 43; see R.Br. 44-45 n.31 (requisite evidence must be "a 'smoking gun' or at least a 'thick cloud of smoke'") (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997))). On that interpretation, "substantial evidence" would be more stringent than the requirement of proof beyond a reasonable doubt, because guilt beyond a reasonable doubt is routinely found in a large number of ordinary criminal cases. Under respondent's "extraordinary" circumstances standard, it apparently would be harder to get a mixed motive instruction than to convict a defendant of capital murder.

The meaning of the "direct evidence" standard is both elusive and malleable. In the court of appeals respondent represented that direct evidence means non-circumstantial evidence. "Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law."

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[10] A Westlaw search for "substantial evidence" in the United States Code identifies more than 1700 provisions.

(Appellant's Brief, 32; see *id.* at 30). In this Court, on the other hand, respondent asserts that under its proposed test "direct evidence" would include certain forms of circumstantial evidence. (R.Br. 17, 43, 46).

Then again, in arguing that the evidence in the instant case did not itself constitute direct evidence, the brief for respondent relies entirely on statements in the district court that the plaintiff had only circumstantial evidence. Respondent states that "the district court recognized that Gross did not present ... direct evidence" (R.Br. 53), quoting the following statement by the district judge:

> [I]n the absence of any direct evidence of discrimination, the jury had to rely on circumstantial evidence and inferences of discrimination to conclude that defendant discriminated against plaintiff based on his age.

(R.Br. 53 n.37). As used by the district judge in this passage, however, "direct evidence" clearly meant non-circumstantial evidence. Respondent asserts that "Gross's counsel acknowledged there was no direct evidence of age discrimination, *by any definition.*" (R.Br. 52 n.35) (emphasis added). But the statements quoted by respondent in fact acknowledged only that there was no "admission by one person that said, oh, yeah, I heard Andy say Jack is too old." (Tr. 741). "You don't have to have the admission" (tr. 746); "[y]ou look at the circumstances." (Tr. 740). This constitutes an acknowledgement of a lack of direct evidence *only* if direct evidence is defined to mean non-circumstantial evidence. Respondent states that "counsel conceded

the absence of direct evidence." (R.Br. 53). But the "concession" to which respondent refers is as follows:

> [W]e don't have anything in this case that says we've got to get rid of Gross because of his age or we've got to demote Gross because of his age or Jack [Gross] is old and over the hill and give that position to [the younger worker], it isn't there.
>
> But *if that's what direct evidence is*, then we don't need it, and there's plenty of this record that's circumstantial to support the conclusion and the inference that age was a basis, age was a motivating factor....

(Appellant's App. 596) (emphasis added). In short, the district court found and petitioner conceded that there was no "direct evidence" only on a meaning of "direct evidence" – non-circumstantial evidence – which respondent in this Court expressly disavows.

"Direct evidence," respondent explains, is evidence that "relates directly" to the allegedly discriminatory action. But much of the evidence in the instant case does relate directly to the disputed demotion – proof that the explanations for Gross's demotion were untrue, proof that Gross's job was given to an unqualified younger worker, and proof that the contemporaneous pattern of demotions and promotions favored younger workers over older employees. Respondent does not offer a definition of "direct evidence" sufficiently specific to predictably distinguish among the wide variety of types of evidence that might be offered to demonstrate the existence of an unlawful purpose.

In one passage respondent asserts that a "plaintiff must *show* by direct evidence that an illegitimate criterion was a substantial factor in the decision." (R.Br. 41-42) (quoting *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring)) (emphasis added). In a case tried to a jury, the issue of whether the plaintiff had "show[n] ... that an illegitimate criterion was a substantial factor in the decision" would be decided by the jury, not the trial judge. Thus on this articulation of respondent's proposed standard, a mixed motive instruction would be proper only if (and after) the trier of fact found, upon considering the direct evidence alone, "that an illegitimate criterion was a substantial factor in the decision." In a jury trial that would require a fairly complicated set of instructions. The jury would be directed to decide, first, if the direct evidence (identified by the court as such) was sufficient by itself to show by a preponderance of the evidence that an impermissible consideration was a motivating factor. If the jury so found, the burden would be on the defendant to prove it would have made the same decision in the absence of discrimination. If, on the other hand, the jury concluded that the direct evidence alone did not suffice, it would be directed to next consider the rest of the plaintiff's evidence and decide whether all the evidence demonstrated the existence of such an unlawful purpose; if so, the burden would be on the plaintiff to prove the employer would not have made the same decision in the absence of discrimination.

Elsewhere in its brief, on the other hand, respondent states that the plaintiff need only "present" or "produce" the requisite evidence.[11] On that view, so long as the plaintiff possessed and could offer at trial the required type of evidence, it would not matter whether the trier of fact ultimately relied on or even believed that evidence. For example, if proffered testimony that a decisionmaker had said "Demote Gross, he is too old for his job" constituted direct evidence, then a mixed motive instruction would be proper, regardless of whether at trial the jury paid no attention to the evidence (because other evidence seemed more important), found contrary evidence more persuasive (because other witnesses denied hearing the asserted remark), or dismissed that direct evidence as wholly incredible (because, for example, the witness was in jail on the date of the asserted statement). See *Okors v. Angelo Iafate Const. Co.*, 298 Fed.Appx. 419 (6th Cir. 2008) (direct evidence conclusively refuted by telephone records).

It would, of course, be possible to fashion any number of heightened proof standards that would be reasonably clear. For example, "direct evidence" could be defined to mean (and be limited to) proof of a biased remark made by a decisionmaker within 48 hours (or 30 days or one year) of the disputed adverse action, or a sworn (or videotaped) admission of unlawful purpose, or to embody a two witness rule like the

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[11] R.Br. 2, 42.

Treason Clause of Article III, section 3. Or "substantial evidence" might be defined to demand proof beyond a reasonable doubt, or proof by clear and convincing evidence.

But in the absence of any statutory language mandating some specific standard, there would be no principled basis on which the courts themselves could select from among these or countless other conceivable heightened evidentiary standards. Respondent's failure to choose among the many heightened proof standards that it hypothesizes may reflect the difficulty respondent would face in explaining why it had selected any particular standard from among all the imaginable alternatives.

(3) The fashioning of a direct evidence standard faces another intensely practical problem. It assuredly would make no sense to define the required direct evidence in a way that included evidence which was *less* probative than the non-direct evidence (however defined) on which the plaintiff could not rely. Respondent itself expresses concern that a mixed motive instruction not be based on insufficiently probative evidence.

Yet it would be difficult to define a particular kind of evidence as "direct" without encompassing within that definition some evidence that would be far from probative. For example, at least most of the alternative definitions of direct evidence would include testimony that the official who demoted Gross stated at the time, "I demoted Gross because of his

age." Yet that definition of direct evidence would include such testimony from a thrice convicted perjurer, with a well-known grudge against the employer, that was contradicted by a roomful of wholly disinterested witnesses. Under the Eighth Circuit's particular definition of direct evidence, testimony about a biased remark by the decisionmaker uttered a month before the demotion would be direct evidence, even if the testimony was highly unreliable, but evidence that the decisionmaker had made such a remark four months earlier would not be direct evidence, even if there were a video recording of the statement. (See Pet. Br. 38 and n.44).

In all events, the very effort of fashioning a per se rule as to what constitutes direct evidence would be inconsistent with this Court's recent decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008). In *Sprint* the plaintiff asserted that the district court had applied a per se rule which barred admission, inter alia, of all discriminatory remarks made by company officials other than her own supervisors. 128 S.Ct. at 1143. Although this Court remanded the case for clarification as to the basis for the district court's order, the Court explicitly held that the utilization of any such per se rule would be improper.

> [H]ad the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance ... under Rule[ ] 401 ... [is] determined in the context

> of the facts and arguments in a particular case, and thus [is] generally not amenable to broad *per se* rules.

128 S.Ct. at 1147. The Eighth Circuit's direct evidence standard in the instant case, which bars reliance on "statements by nondecisionmakers,"[12] is essentially the same per se rule which this Court disapproved in *Sprint*.

Sprint, of course, concerned the admissibility of evidence under Rule 401 of the Federal Rules of Evidence, whereas the instant case deals with the type of evidence needed to obtain a mixed motive instruction. But the underlying problem is essentially the same: no per se rule could take into account the plethora of factors that might bear on the probativeness of a particular kind of evidence. The Federal Rules of Evidence entrust to the trial judge, acting in light of all the particular circumstances of a case, discretion in determining whether "a reasonable person acting as trier [of fact] could assign some weight to evidence." 1 C. Mueller & L. Kirkpatrick, *Federal Evidence*, § 4:1 (2d ed. 2008). Under longstanding federal practice, deeply rooted in the Seventh Amendment, federal judges do not ordinarily undertake to assess the weight of admissible evidence.[13]

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[12] Pet. App. 5a (quoting *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment)).

[13] The one notable exception is that a trial judge may order a new trial because the verdict is against the great weight of the evidence.

The adoption by the appellate courts of per se rules regarding the sufficiency of certain types of evidence – whether to support a particular jury instruction, to defeat summary judgment, or to support a verdict – would improperly intrude on the respective roles of trial judges and of juries in admitting and evaluating evidence.

III. *PRICE WATERHOUSE* SHOULD NOT BE OVERRULED

Price Waterhouse was an interpretation of Title VII as that statute stood in 1989. In the 1991 Civil Rights Act, Congress amended Title VII to address expressly the resolution of a mixed motive case. Respondent asks this Court to overrule *Price Waterhouse*'s 1989 construction of "the text of Title VII in effect at the time" (R.Br. 32), and then to apply this new interpretation of the pre-1991 version of Title VII to the ADEA. Revisiting the interpretation of a statute long superseded by congressional action (Title VII) seems a somewhat roundabout method of construing another law (the ADEA). The principle of stare decisis is nonetheless controlling here.

"Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Paterson v. McLean Credit Union*, 461 U.S. 164, 172-73 (1989). The principle of stare decisis weighs heavily

against revisiting an interpretation of a statute which Congress has not itself overturned. In this instance, rather than merely tacitly acquiescing in the holding in *Price Waterhouse*, Congress affirmatively embraced that decision. Within two years of *Price Waterhouse*, Congress enacted legislation that largely codified the plurality opinion, modifying it only to strengthen[14] the protection against discrimination provided by that decision. Like the *Price Waterhouse* plurality, the 1991 amendments specify that a plaintiff need only show that "race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Where a plaintiff has made such a showing, the burden (as in *Price Waterhouse*) is on the defendant to prove that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). Respondent thus errs in suggesting that the 1991 Act undermined the vitality of *Price Waterhouse* because it "statutorily overruled *Price Waterhouse*" (R.Br. 15) and "expressly returned the burden of persuasion to the employee on all elements of Title VII claims." (R.Br. 37).

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[14] Under *Price Waterhouse* a showing that the employer would have taken the same action in the absence of discrimination precludes a finding of liability. 490 U.S. at 242 (plurality opinion). Under the 1991 Act such a showing only limits the remedies. 42 U.S.C. § 2000e-5(g)(2)(B).

These 1991 amendments applied only to section 703 of Title VII, the specific statute construed by *Price Waterhouse*. But Congress would undoubtedly have anticipated that the principles of *Price Waterhouse* would be applied by the courts to other federal anti-discrimination laws, which often are construed in light of the interpretation of Title VII. By the time the 1991 Act was adopted, the lower courts had applied *Price Waterhouse* to a number of other federal civil rights laws, including the ADEA, albeit with emerging differences about whether or not direct evidence was required. That still unresolved dispute aside, respondent fairly describes Congress's action in 1991 – deliberately choosing not to overturn that decision – as "a ratification of the application of *Price Waterhouse* to the ADEA." (R.Br. 50 n.34.)

Since 1989 the holding of *Price Waterhouse* has become deeply embedded in American law. The courts of appeals have unanimously and repeatedly agreed that *Price Waterhouse* applies to claims under the ADEA. (R.Br. 50 n.34; U.S. Br. 11 n.2). In the wake of *Price Waterhouse*, Congress has enacted a series of new anti-discrimination and anti-retaliation statutes,[15] presumably aware of and intending that the

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[15] The most important of these statutes, in addition to the Americans With Disabilities Act, are the Genetic Information Nondiscrimination Act of 2008 (122 Stat. 881), the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (116 Stat. 566), the Sarbanes-Oxley Act (116 Stat. 745), the Religious Land Use and Institutionalized Persons Act of 2000 (114 Stat. 803), the Presidential and Executive Office

(Continued on following page)

principles of *Price Waterhouse* would apply to this legislation. For example, section 102(a) of the Americans With Disabilities Act, in language similar to section 703 of Title VII, provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). It would materially impede the ability of Congress to legislate against a background of settled legal principles if this Court were to now overturn *Price Waterhouse* and retroactively apply to legislation adopted since 1989 a new interpretation of pre-1991 Title VII. In addition, since 1989 state courts in twenty-eight states, expressly relying on *Price Waterhouse*, have construed state statutes to embody the mixed motive approach contained in this Court's decision.[16] A decision by this Court overturning *Price Waterhouse* would force courts in these states to reexamine this issue, introducing considerable uncertainty and instability into state law. Over the last twenty years the lower federal courts have applied *Price Waterhouse* to numerous federal statutes; were *Price Waterhouse* now overturned, this entire body of judicial precedent would have to be reconsidered.

Respondent contends that the *Price Waterhouse* allocation of burdens has proved "unworkable" (R.Br. 1, 15). But respondent does not explain why it would

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Accountability Act (110 Stat. 4053), the Congressional Accountability Act (109 Stat. 3), and the Family and Medical Leave Act (107 Stat. 6).

[16] See brief appendix.

be difficult to frame a workable jury instruction implementing the allocation of burdens in *Price Waterhouse*. The jury instructions in the instant case are perfectly clear. Regardless of any supposed difficulties, jury instructions embodying such an allocation are emphatically required by the 1991 amendments to Title VII, and thus already apply to the Title VII claims that are at least a plurality of federal employment discrimination cases. The instructions and procedures utilized for Title VII claims would function as easily in ADEA cases.

Respondent asserts that "courts have found *Price Waterhouse* hard to implement in the jury trial context." (R.Br. 33). But the materials cited in respondent's brief do not support that contention. Most of the authorities relied on by respondent actually object only to the lack of any clear and manageable definition of "direct evidence." One article cited by respondent labels Justice O'Connor's concurrence "practically unworkable" because it "failed to provide a clear distinction between the two types of evidence ... direct or circumstantial."[17] *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992), solved that problem by rejecting any direct evidence requirement, and approving a jury instruction essentially identical to the instruction in the instant case. 958 F.2d at 1179-80, 1187. The only "confusion" at issue in *Ostroski v.*

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[17] J. Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am.Bus.L.J. 531, 533 (2008).

Atlantic Mutual Insurance Co., 968 F.2d 171, 186 (2d Cir. 1991), concerned the error of the trial judge who mistakenly assumed that he, not the jury, was to decide whether the plaintiff had shown that an unlawful purpose was a motivating factor. 968 F.2d at 186.

Respondent contends that *Price Waterhouse* was wrongly decided. But its arguments add little new to the four exhaustive opinions fully airing these issues in *Price Waterhouse* itself.

Respondent asserts that under the conventional rule in civil cases a plaintiff is always required to show that the defendant's action was the but-for cause of the plaintiff's injury, that the injury would not have occurred in the absence of the defendant's action. That is not correct. In tort when the injury complained of was the result of two independent actions, each sufficient by itself to cause the injury, neither action would be a "but-for" cause; yet the party responsible for either action would be held liable. Thus if two motorcycles simultaneously pass the plaintiff's horse, which is frightened and runs away, and either vehicle alone would have caused the fright, either motorcyclist may be held liable. In these cases an action sufficient by itself to cause the injury is characterized as a "substantial factor"; where such a factor is shown, there is no affirmative defense.[18]

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[18] W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts*, 266 (5th ed. 1984); *Restatement (Second) of Torts*, § 432(2);

(Continued on following page)

Compared to this conventional tort rule, the standard in *Price Waterhouse* and *Mt. Healthy* is more favorable to defendants, because those decisions permit a defendant to avoid liability by showing that it would have taken the same action in the absence of the proven impermissible purpose.

Respondent asserts that in conventional litigation a defendant never bears the burden of proof with regard to causation. That is not correct. Where an injury was caused by either (but not both) of two actions, the injured party may sue either actor, and the defendant bears the burden of showing that its own action was not the cause.[19] That burden allocation applies, for example, if two hunters negligently fire in the direction of the plaintiff, who is hit by only a single bullet.

Respondent suggests that some provisions in the ADEA contain "particular language" placing the burden of proof on the employer with regard to certain affirmative defenses. (R.Br. 25). These asserted express provisions, it reasons, "make[ ] plain that when Congress wished to place the burden of proof on employers under the ADEA, it knew how to do so explicitly." *Ibid.* But there is no such explicit

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F. Harper, F. James and O. Gray, *Harper, James and Gray on Torts*, § 20.3, pp. 139-41 (3d ed. 2007); D. Dobbs, *The Law of Torts*, § 171, pp. 415-16 (2000).

[19] *Prosser and Keeton on Torts*, § 41 p. 271; *The Law of Torts* § 175, pp. 426-27; *Harper, James and Gray on Torts*, § 20.2, p. 123; *Restatement (Second) of Torts*, § 433B(2).

language in the ADEA. The provisions to which respondent refers contain no reference whatever to the allocation of the burden of proof, and are not even labeled "affirmative defenses" by the ADEA. 29 U.S.C. § 623(f). Both the allocation of that burden, and that characterization, are matters of judicial interpretation. The existence of many of those same affirmative defenses in Title VII[20] did not preclude this Court from framing an affirmative defense, on which the employer bears the burden of proof, in *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998), as well as in *Price Waterhouse*.

Price Waterhouse is entirely consistent with *McDonnell Douglas Corp. v. Green*, 427 U.S. 273 (1976), because the two decisions address distinct issues. *McDonnell Douglas* emphatically is not, as respondent asserts, "a framework for determining causation." (R.Br. 23). Rather, *McDonnell Douglas* is *a* method of proving that an impermissible criterion was a motivating factor (perhaps the sole motive, perhaps one of several) behind a disputed employment action. *Price Waterhouse*, on the other hand, is a method for allocating the burden of proof if the trier of fact has concluded that there were several motivating factors at work, one of which was unlawful. It will

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[20] *Compare* 29 U.S.C. § 623(f)(2)(A) (bona fide seniority system) *with* 42 U.S.C. § 2000e-2(h) (same); *compare* 29 U.S.C. § 623(f)(1) (bona fide occupational qualification) *with* 42 U.S.C. § 2000e-2(e) (same); *compare* 29 U.S.C. § 623(f)(1) (compliance with foreign law) *with* 42 U.S.C. § 2000e-1(b) (same).

rarely if ever be possible to foresee prior to the conclusion of the trial whether the trier of fact – if it finds the existence of an unlawful motive – will conclude that the illicit purpose was the sole motive, or only one of several. Until the jury verdict, or the findings of the court after a bench trial, are known, whether a case involves mixed motives is simply unknowable.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), this Court stated that a disparate treatment claim under the ADEA cannot succeed unless "the employee's protected trait actually played a role in the process and had a determinative influence on the outcome." These decisions cannot be read, as respondent suggests, to overrule *Price Waterhouse sub silentio* or to hold – despite the unanimous views of the lower courts to the contrary – that *Price Waterhouse* has no application to the ADEA. The question of causation simply was not in dispute in these cases, and neither decision indicates which party has the burden of proof on what issue. As the plurality explained in *Price Waterhouse*, where a party "has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that the assertion is inaccurate." 490 U.S. at 246 n.11. Thus the law concludes that age was the determining factor if – as the jury found to be the case here – an employer is unable to meet its burden under *Price Waterhouse*.

IV. RESPONDENT CAN ADVANCE ON REMAND ITS CONTENTION THAT THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT AGE WAS A MOTIVATING FACTOR

In the proceedings below, respondent argued that it was entitled to judgment as a matter of law because no reasonable jury could have found that age was a motivating factor in the demotion of petitioner. The district court rejected this argument, explaining that "there was ample circumstantial evidence presented during trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age." (Pet. App. 25a). "There was ... sufficient evidence for the jury to reasonably conclude that FBL's explanation for demoting Gross was false and a pretext for discrimination." (Pet. App. 27a-28a). "[T]he jury had reasonable grounds to question the credibility of FBL's witnesses because of inconsistencies and contradictions in their testimony." (Pet. App. 29a). The court of appeals, however, did not reach this issue. (Pet. App. 14a).

In this Court respondent renews this challenge to the sufficiency of the evidence, insisting both that the record contains no evidence of discrimination[21] and that counsel for petitioner expressly conceded that

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[21] R.Br. 7, 9, 27 n.18, 47, 56.

the record was fatally deficient.[22] Although we strongly take issue with respondent's characterizations of the record and of the statements of counsel, these are questions which should be dealt with in the first instance by the court of appeals on remand.

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[22] R.Br. 9 n.9, 51.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be vacated and remanded for further consideration consistent with the decision of this Court.

Respectfully submitted,

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In each state the most recent decision in the jurisdiction is listed.

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AMICUS CURIAE BRIEF

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No. 08-441

In the Supreme Court of the United States

JACK GROSS, PETITIONER

v.

FBL FINANCIAL GROUP, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a discrimination case under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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INTEREST OF THE UNITED STATES

This case concerns the appropriate evidentiary standard necessary to trigger mixed-motive jury instructions in cases of intentional discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) has primary responsibility for interpreting and enforcing the ADEA, which prohibits discrimination in employment on the basis of age. The Department of Justice has a significant interest in the interpretation and enforcement of a wide range of federal civil rights statutes, including the ADEA.

STATEMENT

1. Petitioner was born in June, 1948. In 1971, he began working as a claims adjuster for respondent's Iowa Farm Bureau division, handling a wide variety of insurance claims for three counties in Iowa. He left his employment with respondent in 1978, and then returned in 1987, again working at the Iowa Farm Bureau division. Petitioner thereafter received regular promotions. In 1990, petitioner was made division claims manager, supervising eight to nine claims adjusters and a clerical staff. Three years later, in 1993, petitioner was promoted to be regional coordinator and training director. In 1994, petitioner became director of claims administration and had several units reporting to him. Petitioner was promoted again in 1997, when he was made assistant claims manager, and then again in January 1999, when he was made claims administration vice president. Pet. App. 2a, 19a-20a.

Throughout petitioner's tenure with respondent, he was supervised by Tom Eppenauer. Pet App. 19a-20a. Eppenauer consistently gave petitioner high scores on his evaluations. *Id.* at 20a. Eppenauer himself had received several promotions but, in August 2000, he was demoted and no longer had supervisory authority over petitioner. *Id.* at 20a-21a. Eppenauer eventually retired. *Id.* at 21a.

In January 2001, Eppenauer's replacement—Andy Lifland—changed petitioner's job title to claims administration director as part of a department-wide reorganization. While petitioner's job responsibilities remained the same, petitioner viewed the change as a demotion because he received fewer points in the company's salary grade system. Petitioner began to receive lower scores on his job performance evaluations. Two years later, in January 2003, the Iowa Farm Bureau division merged with the Kansas and Nebraska Farm Bureau divisions. Pet. App. 21a. After the

merger, Lifland decided to move petitioner to the position of claims project coordinator, which petitioner viewed as a demotion. *Id.* at 22a-23a. Most of his former duties went to the newly-created position of claims administration manager, which was filled by Lisa Kneeskern. Kneeskern, who was in her early forties, had previously been supervised by petitioner. Petitioner was 54 years old at the time. *Id.* at 23a.

2. Petitioner filed suit under the ADEA, alleging that his 2003 reassignment to a less desirable position amounted to age-based discrimination. Pet. App. 3a. At trial, petitioner introduced evidence that he was highly qualified for the claims administrator manager position, and that Kneeskern was either far less qualified or, as Eppenauer testified, "not qualified" for the position. *Id.* at 26a. Eppenauer also testified at trial that Kneeskern's experience in claims administration was extremely limited because she had never worked in field adjusting, bodily injury claims, total loss automobile claims, workers' compensation, and several other claims areas. *Ibid.* He also testified that petitioner, by contrast, had "superb knowledge" about every area in the department. *Id.* at 27a.

Respondent claimed that it assigned petitioner to the claims project coordinator position because it felt that was the best fit for his strengths, but petitioner produced evidence that the explanation was false and a pretext for discrimination. Pet. App. 23a, 28a. The evidence adduced at trial indicated that the position was, in fact, ill-defined and lacked any specific job duties. *Id.* at 28a. Moreover, inconsistencies and contradictions in Lifland's testimony undermined his credibility. *Id.* at 29a-30a.

Petitioner produced additional evidence suggesting the reassignment was age-based. There was evidence that, following the reorganization, "everybody over 50 [from the

Kansas Farm Bureau division] got bought out." Pet. App. 25a (citation omitted). As for respondent's older employees in Iowa, petitioner testified that the successful, well-paid older employees "were all pretty much taken down at the same time." *Ibid.* Eppenauer likewise testified that a number of senior employees with significant experience "were isolated and demoted." *Id.* at 30a-31a.

At the close of trial, the district court instructed the jury that it should return a verdict for petitioner if it "[has] been proved by the preponderance of the evidence * * * [that] plaintiff's age was a motivating factor" in respondent's decision to demote him. J.A. 9-10. The district court further instructed the jury that it should return a verdict for respondent "if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." J.A. 10. The district court further told the jury that it may find that "age was a motivating factor if you find defendant's stated reasons for its decision are not the real reasons, but are a pretext to hide age discrimination." *Ibid.* The court, in a separate instruction to the jury, explained that petitioner's age was "a 'motivating factor,' if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff." *Ibid.* The jury found in favor of petitioner and awarded him $46,945 in lost compensation. Pet. App. 3a.

The district court denied respondent's motion for judgment as a matter of law or for a new trial. Pet. App. 15a-48a. The district court held that even though there was no "direct evidence of discrimination," there was "ample circumstantial evidence * * * that [respondent] intentionally discriminated against [petitioner] based on his age." *Id.* at 25a. In particular, the court pointed to evidence that peti-

tioner "was far more experienced and qualified than Kneeskern for the claims administration manager position," *ibid.*; that petitioner "was never even provided an opportunity to apply for the claims administration manager position," *id.* 27a; that other older employees were demoted after the 2003 merger, *id.* at 30a-31a; and that the stated reason for demoting petitioner—namely, that his new position was "a good fit for his strengths and weaknesses"—"was not credible because there was no defined position for [petitioner] to 'fit' into." *Id.* at 28a.

3. The court of appeals reversed and remanded the case for a new trial. Pet. App. 1a-14a. The court held that the district court improperly instructed the jury that "if [petitioner] proved by any evidence—direct or otherwise—that age was 'a motivating factor' in the employment decision, then the burden shifted to [respondent] to prove that its decision would have been the same absent consideration of [petitioner]'s age." *Id.* at 6a-7a. After observing that it has applied several of this Court's decisions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to claims under the ADEA, Pet. App. 4a, the court of appeals held that the district court's instruction permitting the burden to shift to the defendant was only permissible in a mixed-motive case, *i.e.*, "where an employer is motivated by both permissible and impermissible considerations," *id.* at 5a.

In the court of appeals' view, Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), required the plaintiff in a Title VII case, in order to obtain a mixed-motive instruction, to "show 'by direct evidence that an illegitimate factor played a substantial role' in the employment decision." Pet. App. 5a (quoting *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring in the judgment)). The court of appeals fur-

ther held that if a plaintiff "fails to present 'direct evidence' that an illegitimate criterion played a 'substantial role' in the employment decision," then the burden of persuasion should remain at all times with the plaintiff under the framework for single-motive cases under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 6a.

The court of appeals rejected petitioner's argument that 42 U.S.C. 2000e-2(m), enacted as part of the Civil Rights Act of 1991 amending Title VII, and the Supreme Court's decision construing that amendment in *Desert Palace, Inc.*, v. *Costa*, 539 U.S. 90 (2003) (*Desert Palace*), eliminated any requirement under the ADEA that the plaintiff introduce direct evidence of discrimination. The court, although recognizing that *Desert Palace* held that 42 U.S.C. 2000e-2(m) does not contain a direct evidence requirement, explained that *Desert Palace* based its decision on the language of Section 2000e-2(m), and that provision by its own terms applied to claims under Title VII, not under the ADEA. Pet. App. 9a-12a. The court of appeals thus concluded that "[e]ven if some of the analysis in *Desert Palace* may seem inconsistent with the controlling ruling from *Price Waterhouse*, the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable." *Id.* at 11a. Because the court held that the jury was improperly instructed, the court did not address respondent's additional argument that the evidence was insufficient as a matter of law to find for the petitioner. *Id.* at 14a, 16a.

SUMMARY OF ARGUMENT

The court of appeals erred in requiring that a plaintiff under the ADEA must present direct evidence of discrimination.

Price Waterhouse agreed, however, that once a plaintiff met his or her burden of proving that sex was a motivating or substantial factor in the employment decision, "an employer could 'avoid a finding of liability . . . by proving that it would have made the same decision even if it had not allowed gender to play * * * a role.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 244 (plurality opinion)).[4] The Court disagreed, however, "over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense." *Ibid.*

The *Price Waterhouse* plurality, comprised of four Justices, would have held that a plaintiff must prove "that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258 (plurality opinion). "The plurality did not, however, 'suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 251-252).

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[4] As discussed in *Desert Palace*, Congress responded to the holding of *Price Waterhouse* by amending Title VII to include 42 U.S.C. 2000e-2(m), which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." The amended statute further provides that if an employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court may award the plaintiff declaratory relief, certain injunctive relief, and attorney's fees, but may not award damages or order reinstatement, hiring, or promotion. 42 U.S.C. 2000e-5(g)(2)(B). Congress did not add similar language to the ADEA in the Civil Rights Act of 1991. For the reasons discussed below, see p. 22, *infra*, the significance of that difference was greatly exaggerated by the Eighth Circuit below.

Justice White, concurring in the judgment in *Price Waterhouse*, would have held that a mixed-motive case is governed by *Mt. Healthy*, and would have "shifted the burden to the employer only when a plaintiff 'show[ed] that the unlawful motive was a *substantial* factor in the adverse employment action.'" *Desert Palace*, 539 U.S. at 93 (quoting *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) (brackets in original)); see *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) (initial burden on plaintiff to show protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision") (quoting *Mt. Healthy*, 429 U.S. at 287). Justice White did not state that direct evidence would be required, and *Mt. Healthy*, on which he relied, does not impose such a requirement. See p. 18, *supra*.

Finally, Justice O'Connor would have required that a plaintiff in a mixed-motive case "show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision" before shifting the burden to the employer to show it would have made the same decision absent discrimination. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in the judgment) (emphasis added).

2. In this case, the court of appeals held that Justice O'Connor's concurring opinion was the controlling opinion in *Price Waterhouse*, see Pet. App. 5a, and that it remained controlling with respect to the ADEA even after this Court's decision in *Desert Palace*. See *id.* at 8a, 11a ("Even if some of the analysis in *Desert Palace* may seem inconsistent with the controlling rule from *Price Waterhouse*, the Court did not speak directly to the vitality of this previous decision, and it continues to be controlling where applicable."). This Court in *Desert Palace* saw "no need to address which of the opinions in *Price Waterhouse* is controlling" because a direct evidence requirement was "inconsistent

with the text of § 2000e-2(m)." *Desert Palace*, 539 U.S. at 98.[5] Likewise, the Court need not untangle the various opinions in *Price Waterhouse* to resolve the issue presented in this case. Even assuming Justice O'Connor's separate opinion was controlling in *Price Waterhouse* in construing Title VII, that conclusion would not support the adoption of a novel direct evidence requirement under the ADEA. This Court's *subsequent* and *unanimous* decision in *Desert Palace* embraced an analysis that weighs heavily against adoption of a direct evidence requirement under a discrimination statute absent a statutory directive. Now that the issue is squarely before the Court under the ADEA, this Court should reject the imposition of a direct evidence requirement for the reasons set forth in *Desert Palace*.

Nor is a direct evidence requirement supported by the fact that Congress amended Title VII in 1991 without also correspondingly amending the ADEA. See Pet. App. 8a-11a (suggesting that Congress ratified a direct evidence

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[5] In *Desert Palace*, the United States argued that *Price Waterhouse* imposed a direct evidence requirement and that such a requirement survived the 1991 amendments to Title VII that added 42 U.S.C. 2000e-2(m). U.S. Amicus Brief at 11-24, *Desert Palace*, *supra* (No. 02-679). Similarly, the EEOC in its Compliance Manual interpreting the 1991 amendments assumed that direct evidence was required in a mixed-motive case under Title VII. *EEOC Compliance Manual* § 604, at 604:0141 (Sept. 2002) (Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)). The EEOC recently revised that Guidance in light of *Desert Palace* to provide that "[t]he 1992 Enforcement Guidance's statements about the need for direct evidence in mixed-motive cases are contrary to [*Desert Palace*]," and therefore "[t]hose statements * * * are no longer in effect." *Effect of* Desert Palace, Inc. *v.* Costa, *539 U.S. 90 (2003), on Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory (July 14, 1992)*, EEOC Directives Transmittal No. 915.002 (Jan. 16, 2009) <http://www.eeoc.gov/policy/docs/disparat.html>.

requirement under the ADEA when it amended Title VII in 1991 without amending the ADEA); cf. p. 21 n.4, *supra*. As an initial matter, the pertinent 1991 amendment "does not mention" direct evidence (*Desert Palace*, 539 U.S. at 98-99)—much less indicate that Congress meant to approve a direct evidence rule for discrimination cases generally and simply carved out an exception only for Title VII. The 1991 amendment to Title VII therefore in no way implies that Congress intended that circumstantial evidence would be insufficient under the ADEA. Moreover, after *Price Waterhouse*, the circuits were divided on the question whether Justice O'Connor's opinion in *Price Waterhouse* was controlling. See *Desert Palace*, 539 U.S. at 95 (noting conflict in the circuits); *e.g.*, *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.) ("'[D]irect evidence' was *not* a requirement imposed by the majority in *Price Waterhouse*."), cert. denied, 506 U.S. 826 (1992). Accordingly, when Congress amended Title VII in 1991, there was no settled direct evidence requirement under *Price Waterhouse* that Congress could be regarded as having ratified for application under the ADEA. See *Jama* v. *ICE*, 543 U.S. 335, 350-351 (2005); *Grogan* v. *Garner*, 498 U.S. 279, 290 (1991).

In all events, it is far more likely that Congress intended the ADEA (as well as other discrimination statutes) to be construed consistent with (1) the long-settled and "deep rooted" treatment of circumstantial evidence as on par with direct evidence (*Desert Palace*, 539 U.S. at 100); (2) this Court's repeated recognition that circumstantial evidence may be used to show discrimination; and (3) the applicability of the general rules of civil litigation to discrimination statutes, including the ADEA. In short, Justice O'Connor's separate opinion in *Price Waterhouse*, in which no other

Justice joined, is simply too thin a reed on which to erect an anomalous direct evidence requirement under the ADEA.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings consistent with the views set forth in this brief.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 08-441

In the Supreme Court of The United States

JACK GROSS,
Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's nearly 40 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA) and the other federal employment discrimination laws that will be affected by the Court's decision in this case. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

In this case it is AARP's view that the Court need not and should not create a hierarchy among the federal work place civil rights laws - with one low evidentiary burden for Title VII mixed motive claims on the one hand and a higher burden for such claims arising under the ADEA and all other federal statutes applicable to work place discrimination claims on the other. Indeed, there are no compelling legal or policy reasons for doing so. Rather, a decision that the *same* standard is applicable to all such claims would simplify a proof paradigm about which there has been substantial confusion – much as this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), brought order to the chaos in the lower courts surrounding discrimination cases to

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

which the *McDonnell Douglas*[2/] proof paradigm is applicable. AARP files this brief *amicus curiae* to urge the Court to hold justly that, like plaintiffs in Title VII cases, plaintiffs under the ADEA and the other federal workplace civil rights statutes need not provide direct evidence of discrimination in order to obtain a mixed motive jury instruction.

SUMMARY OF ARGUMENT

Since the substantive, antidiscrimination provisions of the ADEA are identical to those of Title VII, the Court should rely on its sound reasoning in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003), based on the text of Title VII, to hold that mixed motive claims under Title VII and the ADEA are subject to the same proof standard. Like Title VII, neither the ADEA nor any of the other federal work place anti-discrimination statutes includes a heightened proof standard for mixed motive claims. As the Court pointed out in *Desert Palace*, a direct evidence requirement would be inconsistent with the usual preponderance of the evidence standard of proof in civil cases. The Court also explained in *Desert Palace* that the absence of a direct evidence requirement in the language of Title VII was particularly significant because Congress has been "unequivocal" when imposing heightened proof requirements in other circumstances. Further, the Civil Rights Act of 1991 (CRA), which amended Title VII to modify the result of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), but did not so amend the ADEA, does not even mention direct evidence. Additionally, the fact that the CRA did not similarly amend the ADEA is not a sufficient reason to continue to apply to ADEA mixed motive claims the direct evidence requirement articulated by Justice O'Connor in her concurring opinion in *Price Waterhouse*, a requirement that, as pointed out in

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[2/] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Petitioner's Brief at 53 and as discussed herein, was implicitly rejected by five justices in that case.

Moreover, this Court has pointedly declared that the ADEA and Title VII share the goal of eliminating the discriminatory work place and in pursuit of that elusive goal has concluded in other contexts that the failure of Congress to similarly amend these statutes does not bar construing them in similar fashion in order to achieve a just result. Thus, in the absence of any compelling legal or policy reasons to apply a different proof standard to mixed motive claims depending on which statute is involved, it would be unfair and unjust to do so.

ARGUMENT

I. THIS COURT'S SOUND REASONING IN *DESERT PALACE* BASED ON THE TEXT OF TITLE VII APPLIES EQUALLY TO THE IDENTICAL LANGUAGE OF THE ADEA.

Title VII of the Civil Rights Act of 1964 provides that it is an "unlawful employment practice for an employer ... to discriminate against any individual ..., *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a) (1) [emphasis added]. Twenty years ago in *Price Waterhouse*, a Title VII sex discrimination case in which there was no majority opinion, this Court concluded that if the plaintiff shows that both legitimate and illegitimate reasons motivated the employer's decision, she had proved that the decision was "because of" the illegitimate reason (in *Price Waterhouse*, the plaintiff's sex), but that the employer could avoid liability if it could prove it would have made the same decision in the absence of the illegitimate reason. 490 U.S. at 244.

As pointed out in *Desert Palace*, 539 U.S. at 93, the *Price Waterhouse* Court was "divided, however,

over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense." Justice Brennan, writing for a plurality of four justices concluded that the burden should shift when the "plaintiff proves that her gender played a *motivating* part in the employer's decision." *Price Waterhouse*, 490 U.S. at 258. Justice White and Justice O'Connor wrote separate opinions concurring in the judgment and concluding that the burden should shift if the plaintiff showed that the illegitimate consideration was a "substantial factor" in the employment decision. *Price Waterhouse*, 490 U.S. at 259 and 276. As *Desert Palace* makes clear, however, the *Price Waterhouse* plurality of four justices "did not 'suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision.'" 539 U.S. at 93, quoting *Price Waterhouse*, 490 U.S. at 252-252. And while Justice White and Justice O'Connor agreed the plaintiff must show that the unlawful motive was a "substantial factor," of the six justices supporting the judgment only Justice O'Connor concluded that the plaintiff must make such a showing by direct evidence. Thus, the standard for shifting the burden of proof endorsed by five justices - the plurality plus Justice White - did not include a direct evidence requirement. It, therefore, appears that the court below, like many other courts, mistakenly concluded that the "holding" of *Price Waterhouse* is that in order to shift the burden of proof in a mixed motive case the plaintiff must show that an illegitimate consideration was a substantial factor in the employment decision by direct evidence.

The Civil Rights Act of 1991 (CRA) amended Title VII to clarify that a plaintiff in a mixed motive case may establish defendant's liability simply by proving that discrimination was a "motivating" factor; however, since the ADEA was not so amended, pursuant to *Price Waterhouse* an ADEA plaintiff must show that discrimination was either a "motivating" factor or a "substantial" factor, depending on which

Price Waterhouse opinion the trial court views as controlling. While a superficial reading suggests that these terms create different standards, in fact *Price Waterhouse* did not define either and in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a First Amendment case, this Court rejected such a view by equating the two terms:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him.

Id. at 287. If, indeed, there is any difference between these formulations of *what* the plaintiff must prove, it should have no effect on *how* the plaintiff proves it, *i.e.*, whether it is by direct or circumstantial evidence.

Based in part on the text of the prohibitory language of Title VII and in part on the CRA amendments to Title VII two years after the *Price Waterhouse* decision, this Court held in *Desert Palace* that in a Title VII sex discrimination case the plaintiff need not present direct evidence of discrimination in order to have the jury instructed that if it finds that the employer's decision to terminate the plaintiff was motivated by both legitimate and illegitimate motives, its verdict should be that the employer discriminated against her "because of" her sex.[3] The holding of

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[3] The relevant part of the instruction is:

"You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the

Desert Palace should apply to the ADEA because the age Act's prohibitory language, "derived *in haec verba*" from Title VII, *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), provides that it is an unlawful employment practice "for an employer ... to ... discriminate against any individual ... *because of* such individual's" age. 29 U.S.C. § 621(a)(1) [emphasis added]. *See Smith v. City of Jackson, Mississippi, et al.*, 544 U.S. 228, 236 (2005) (holding that the ADEA authorizes recovery for disparate impact claims, in part because "*Griggs* [*v. Duke Power Co.*, 401 U.S. 424 (1971)], which interpreted the identical [Title VII] text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA."); *accord, e.g., Norcross v. Memphis Bd. Of Educ.*, 412 U.S. 427, 428 (1973) ("The similarity in language ... is, of course, a strong indication that the two statutes should be interpreted *pari passu*.").

The legislative history of the CRA supports this conclusion:

> [A] number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act.

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defendant's conduct was also motivated by a lawful reason." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96 (2003).

H.R. Rep. 102-40 pt. 2, at 4 (1991).

The CRA amended Title VII, but not the ADEA,[4] to clarify and ameliorate the result of Price *Waterhouse*[5] in two new statutory sections, neither of which affects how the plaintiff proves his/her case. First, new section 42 U.S.C. § 2000e-2 (m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Second, new section 42 U.S.C. § 2000e-5 (g)(2)(B) provides that if "an individual proves a violation under section 2000e-2 (m)," the employer has only a limited affirmative defense that, contrary to the result of *Price Waterhouse*, does not absolve it of liability, but restricts the remedies available to the plaintiff. Thus, the fact that these changes were not amended into the ADEA does not even suggest that the direct evidence requirement that was implicitly rejected a majority of the justices in *Price Waterhouse* should be imposed in ADEA mixed motive cases.

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[4] *See* Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 Berkeley J. EMP. & LAB. L. 217, 264-265 (2007) (discussing the CRA amendment of Title VII, but not the ADEA, regarding disparate impact claims): "To expect that Congress would head off what , at the time, was a mere conjecture that Wards Cove [*Packing Co. v. Antonio*, 490 U.S. 642 (1989)] would be applied to the ADEA is to ask too much of Congress. That is particularly true considering that the interest groups most concerned with the fate of the ADEA felt no immediate motivation to lobby for a similar amendment to the ADEA."

[5] "[T]he Act responds to Price Waterhouse by reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. Rep. 102-40 pt. 2, at 2 (1991).

Legislative restraint provides another plausible explanation for the CRA's failure to include the ADEA in the *Price Waterhouse* amendments. Specifically, "[t]he 1991 amendments responded to several Supreme Court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA ...." *Camacho v. Sears Roebuck*, 939 F. Supp. 113, 120 (D.P.R. 1996). In such circumstances, the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *NLRB v. Plasterers' Local Union No 79*, 404 U.S. 116, 129-30 (1971) quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). *See also Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 629 (1987) (Scalia, J., dissenting) ("*any* reliance on congressional failure to act is necessarily a 'canard.'") (emphasis in original).

Title VII as amended by the CRA "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Desert Palace*, 539 U.S. at 98-99. The CRA itself does not mention or even refer to direct evidence. If Congress intended to require "direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect" in the CRA amendments to Title VII and by applying such amending language to the ADEA and the other federal work place civil rights statutes. *Id.* at 99. Congress' "failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title" VII. *Id.* The Court also found significant the statutory "silence with respect to the type of evidence required in mixed motive cases" which "suggests that we should not depart from the conventional rule of civil litigation that generally

applies in [employment discrimination] cases," ... which "requires a plaintiff to prove his case by a preponderance of the evidence using direct or circumstantial evidence." *Id.* (internal citations and quotation marks omitted). One year after the Court's decision in *Desert Palace* rejecting the direct evidence requirement for Title VII mixed motive cases, the Fifth Circuit relied on the reasoning of that decision to similarly reject it in an ADEA case:

> Given that the language of the relevant provision of the ADEA is similarly silent as the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed motive analysis for an ADEA claim.

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004); *see Strauch v. Am. College of Surgeons*, 301 F.Supp.2d 839, 844 (N.D.Ill. 2004), cited in *Rachid*, 376 F.3d at 311:

> "Given the similarities in text and purpose between Title VII and the ADEA, as well as the consistent trend of transferring the various proof methods and their accompanying rules from one statute to the other, this Court considers it likely that whatever doctrinal changes emerge as a result of *Desert Palace* in the Title VII context will be found equally applicable in the ADEA arena.

These sound reasons for not engrafting a direct evidence requirement onto Title VII apply with equal force to the ADEA and the other federal work place civil rights statutes, all of which are silent as to a heightened proof standard.

II. IT WOULD BE UNFAIR AND UNJUST TO IMPOSE A DIFFERENT PROOF STANDARD FOR THE SAME KIND OF CLAIM UNDER TITLE VII AND THE ADEA, GIVEN THE IDENTITY OF PROHIBITORY LANGUAGE AND PURPOSE OF THE TWO STATUTES.

As discussed above, the Court in *Desert Palace* held that the plaintiff in a Title VII mixed motive case is not required to provide direct evidence of discrimination in order to shift the burden of proof to defendant. This holding was based in part on statutory language that Congress enacted word for word into the ADEA. The identity of this language in the two statutes coupled with Congress' identical purpose in enacting them, as well as their synergistic effect in deterring and remedying work place discrimination also argue that the same standard of proof should be applied to the same kinds of claims under both statutes.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), the Court declared:

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.

The Court pointedly stated:

> The ADEA and Title VII share common substantive features and also a common purpose: the elimination of discrimination in the workplace.

Id. at 358 (internal citations and quotation marks omitted).

The Court then elaborated on the purposes of the two statutes:

> Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination. Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination another.

Id. (internal citations and quotation marks omitted). Since these conclusions are also generally applicable to the other federal work place civil rights statutes that will be affected by the Court's decision in this case, it would disserve all mixed motive claimants under these laws to impose on them a different and higher proof standard than that applicable to Title VII.

CONCLUSION

There are no compelling reasons to impose on ADEA mixed motive claimants a different and more onerous evidentiary burden than that applicable to such claimants under Title VII. The relevant language and purposes of Title VII and the ADEA are identical and there is no indication of congressional intent to differentiate between Title VII and the ADEA or the other federal antidiscrimination statutes when it comes to such claims. The Court should reject the direct evidence requirement for ADEA mixed motive claims for the same reasons it has done so for Title VII mixed motive claims. To do otherwise would proclaim that age discrimination, disability discrimination, and the other forms of discrimination prohibited by the

non-Title VII federal legislation are less onerous, less invidious, and, therefore, less deserving of societal condemnation than those grounds enumerated in Title VII. The Court should, therefore, hold that the plaintiff in an ADEA mixed motive case need not provide direct evidence of discrimination in order to shift the burden of proof to the defendant.

February 2, 2009

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are victims of employment discrimination who seek legal redress under Title VII, the Age Discrimination in Employment Act or other civil rights statutes.

In AAJ's view, these statutory remedies should be freely available, not only to compensate the victims of illegal discrimination, but also to ensure that society reaps the benefits of the work of qualified individuals. For that reason AAJ suggests that a single standard, grounded in the statute and free of arbitrary criteria, be applied in all cases.

SUMMARY OF ARGUMENT

In this case, the Court is asked to determine whether direct evidence is required for a motivating-factor jury instruction in a case arising under the ADEA, 29 U.S.C. §§ 621 *et seq.* In *Desert Palace v. Costa*, 539 U.S. 90 (2003), this Court ruled that direct evidence is not required for a motivating-factor jury instruction in cases arising under Title VII, 42 U.S.C. § 2000e-2(m). Because the reasoning of *Desert Palace* is equally as compelling in ADEA cases, AAJ believes that direct evidence should not be required for a

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *Amicus Curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

motivating-factor jury instruction. Moreover, both Title VII and the ADEA prohibit discrimination "because of" a protected characteristic. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court construed the statutory language of Title VII "because of" to mean that Plaintiff's burden was to prove that a protected characteristic "played a motivating part in an employment decision . . . ." *Id.* at 244. Conventional rules of litigation mandate that the same standards of causation should not require a different method of proof.

The Court's decision in *Desert Palace* left many unanswered questions, which has created confusion in the lower courts. This Court should clarify now that all employment discrimination cases are potentially multiple-motive cases, requiring proof that an illegal reason was the motivating factor for an adverse employment action. The defendant can limit either liability or damages by proving that while age was a motivating factor, it was not a "determining factor" or "but-for" reason for an adverse employment action—the same-decision affirmative defense. In the alternative, to simplify jury instructions and reduce the risk of jury confusion, plaintiffs may choose to meet the higher "determining-factor /but-for" standard, rendering the same-decision affirmative defense moot.

Distinctions based on direct/circumstantial evidence, the number of motives, and the strength of Plaintiff's case are all arbitrary and are unrelated to the statutory text. The Court should reject these arbitrary distinctions and instead focus on whether under the language of the statute the defendant took adverse action "because of" an illegal reason.

ARGUMENT

I. DIRECT EVIDENCE IS NOT REQUIRED FOR A MOTIVATING FACTOR JURY INSTRUCTION.

Courts have generally recognized two frameworks for analyzing disparate treatment discrimination cases. Although the terminology adopted by the lower courts has led to confusion, the first framework has its origins in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *McDonnell Douglas* evidentiary framework is a *guideline* using shifting burdens at summary judgment to assist the court in determining the existence of an illegal motive. The application of *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. "Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The shifting burdens of *McDonnell Douglas* were never intended to impede Plaintiff's ability to reach trial. To the contrary, they were developed in recognition that discriminatory intent is often difficult to prove and to assist Plaintiff in surviving summary judgment. *McDonnell Douglas*, 411 U.S. at 802-03. No particular type of evidence is required to establish a violation of the ADEA. Nor is it significant how that evidence is designated—as part of the prima facie case or pretext. Nor is it significant whether that evidence is classified as "direct" or "circumstantial." The inflexible application of the *McDonnell Douglas* shifting burdens creates a barrier to the vindication of civil rights, and is inconsistent with federal legislative policy.

The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all.

Under the *McDonnell Douglas* or "pretext" framework, Plaintiff is simply required at trial to prove that an illegal reason was "a determining factor" in the decision to take adverse action.[2] Because Plaintiff assumes the burden of proving that the illegal reason was the "but-for" cause of the adverse employment action, there exists no affirmative defense.

The second framework was recognized in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and was later codified in the Civil Rights of Act of 1991, 42 U.S.C. § 2000e-2(m). This model does not utilize shifting burdens at summary judgment, but instead focuses more directly on proving that a protected characteristic was a "motivating factor" in the decision

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[2] It is generally recognized that the shifting burdens established in *McDonnell Douglas* are not an appropriate jury instruction. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that [courts] should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof' in deciding this ultimate question") (citation omitted); *Brown v. Packaging Corp. of America*, 338 F.3d 586, 595-99 (6th Cir. 2003) (citing cases from the Second, Fourth, Fifth, Seventh, Eight, Ninth, Tenth, and Eleventh Circuits); *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 528 n.10 (6th Cir. 2007) (comparing pattern jury instructions).

to take adverse action. In *Price Waterhouse*, the Court ruled that the defendant could defeat liability by proving as an affirmative defense that it would have taken the same action without consideration of the protected characteristic. *Id.* at 246.

The evidentiary framework of *McDonnell Douglas* is not inconsistent with the motivating-factor standard articulated in *Price Waterhouse* and qualified by the Civil Rights Act of 1991. They are two separate concepts. The shifting burdens of *McDonnell Douglas* provide an evidentiary framework for the purpose of proving discriminatory intent; the existence of a discriminatory motive. The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all. *Price Waterhouse*, on the other hand, addresses the issue of causation and not intent.

The motivating-factor standard codified in the Civil Rights of Act of 1991 enabled Plaintiff to establish liability upon a showing that a protected characteristic was a motivating factor, but allowed the Defendant to escape damages and certain types of equitable relief only after satisfying its burden that it would have made the same decision even without consideration of the protected characteristic. 42 U.S.C. § 2000e-5(g)(2)(B). The statute did not, however, attempt to regulate the method of proof or the type of evidence to be utilized.

In *Desert Palace v. Costa,* 539 U.S. 90 (2003), the Court was asked to resolve the considerable confusion about whether direct evidence was required to obtain a motivating-factor jury instruction. In relevant part,

the Court ruled that nothing in the text of the statute required a heightened standard of direct evidence, *id.* at 98-99, and also relied upon the long standing rule of law that direct evidence is not more probative than circumstantial evidence. *Id.* at 100.[3]

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[3] Some federal judges and commentators have opined that *Desert Palace* has rendered the *McDonnell Douglas* model obsolete and it has no applicability to cases at the summary judgment stage or any other stage. *See Griffith v. City of Des Moines,* 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson Concurring) ("For thirty years, courts have been slaves to the *McDonnell Douglas* burden shifting paradigm that is inconsistent with Title VII. *McDonnell Douglas* cannot be reconciled with the Civil Rights Act of 1991, as it is indignant to the clear text of the statute"); *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hatrz, J. Dissenting) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from 'the ultimate question of discrimination *vel non*.' *McDonnell Douglas* has served its purpose and should be abandoned") (citation omitted); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 867 (9th 2002) (en banc) (Gould dissenting) ("The Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of *Hopkins* that jettisons the direct evidence requirement") *affirmed* 539 U.S. 90 (2003); William Corbett, *McDonnell Douglas, 1973-2003: May You Rest In Peace,* 6 U. PA. J. LAB. & EMP. L. 199, 212 (2003-04) ("*McDonnell Douglas* is dead for Title VII claims because the Supreme Court eradicated the direct evidence limitation that made motivating factor/mixed motives applicable to only a discrete set of cases"). *But see Dunbar v. Pepsi Cola General Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1197 (N.D. Iowa 2003) (Bennett, J.) ("Thus, the *McDonnell Douglas* burden-shifting paradigm must only be *modified* in light of *Desert Palace* . . ., and *only in its final stage,* so that it is framed in terms of whether the plaintiff can meet his or her 'ultimate burden' to prove intentional discrimination, rather than in terms of

Both Title VII, 42 U.S.C. § 2000e-2(a)(1), and the ADEA, 29 U.S.C. § 623(a)(1), prohibit discrimination "because of" a protected characteristic. In *Price Waterhouse*, the Court construed the statutory language of Title VII "because of" to mean that "gender must be irrelevant to employment decisions." 490 U.S. at 240. The Court established that Plaintiff's burden was to prove that a protected characteristic "played a motivating part in an employment decision . . . ." *Id.* at 244. Conventional rules of litigation mandate that the same standards of causation should not require a different method of proof. (*See* Pet'r Br. 27-30.)

Furthermore, requiring courts to distinguish between direct and circumstantial evidence will inevitably lead to confusion and subjective judicial judgments concerning the nature of the evidence which qualifies as "direct." As stated by the Ninth Circuit, "[t]he resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-53 (9th Cir. 2002) (discussing different standards by different circuits and

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whether the plaintiff can prove 'pretext'") (emphasis in original); T.L. Nagy, *The False Dicotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 151-154 (2004) (collecting nineteen District Court cases, and recognizing Judge Bennett's modification to the third step of *McDonnell Douglas* as the trend); Christopher R. Hedican, James M. Hedican, & Mark P.A. Hudson, *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383, 413-25 (2004) (arguing that courts and legal commentators who believe that *McDonnell Douglas* has been overruled are wrong, and that Judge Bennett's modified approach in *Dunbar* is consistent with *McDonnell Douglas*).

inconsistent ruling by panels of the same circuit). *See also* Michael Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STANFORD L. REV. 959, 970-80 (1994) (recognizing the differing approaches to direct evidence within the circuits).

II. THE COURT SHOULD ADOPT A SINGLE STANDARD TO BE APPLIED IN ALL DISCRIMINATION CASES

Although the Court in *Desert Palace* determined that direct evidence was not required for a motivating-factor jury instruction in a Title VII case, it did not establish an alternative criteria for making that judgment. This failure has resulted in substantial confusion in the lower courts concerning which model applies and the standard for making that judgment. *See* NELA Amicus Br. Supp. of Pet. 19-23; *Wright v. Murray Guard Inc.*, 455 F.3d 702, 716-19 (6th Cir. 2006) (discussing different approaches by the circuits) (Moore J. concurring).[4]

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[4] There is also considerable disagreement in the lower courts about whether the holding of *Desert Place* was intended to apply to summary judgment. *Compare White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008) ("holding that the *McDonnell Douglas/Burdine* burden-shifting framework does not apply to the summary judgment analysis of Title VII mixed-motive claims") (footnote omitted); *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions") (footnote omitted); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting an argument that "the *McDonnell Douglas* burden-shifting analysis . . . was radically revised by the Supreme Court in *Desert*

This Court should reject the requirement of direct evidence for all non-Title VII cases as arbitrary. It should further reject efforts to replace this arbitrary rule with a different arbitrary rule, including the number of motives or a subjective determination about the strength of Plaintiff's case. Instead of trying to preserve an arbitrary and unworkable distinction between so-called "direct evidence"/ "*Price Waterhouse*"/ "mixed-motive" cases, on one hand, and "circumstantial evidence"/ "*McDonnell Douglas*"/ "pretext cases" on the other hand, courts should return to the text of the anti-discrimination statute at issue, and determine whether the plaintiff demonstrated that the defendant took adverse action "because of" an illegitimate reason(s). The Court should adopt a single standard for use in all discrimination cases based upon ordinary principles of statutory interpretation to determine the proper standard of causation for a particular statute. *See* Michael J. Zimmer, *The New Discrimination Law; Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1891 (2004) (arguing for "a uniform method of proof for individual discrimination Cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard to differentiated rules regarding proof structures").

Palace" and noting that "after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases") (citations omitted) *with Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007) ("Instead, 'when responding to a summary judgment motion . . . [the plaintiff] may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer]'.") (citation omitted).

A. The Court Should Reject the Number of Motives as a Criteria for Distinguishing Causation. All Cases Are *Potentially* Multiple Motive Cases.

The phrase "mixed-motives" has become a term of art which has nothing to do with number of the employer's motives and has led to considerable confusion. The number of an employer's motives is irrelevant to the proper standard of causation.

If a case is deemed a "mixed-motive" case, it proceeds at the summary judgment stage and at trial to focus directly on proving that a protected characteristic was a "motivating factor" in the decision to take adverse action subject to the same-decision affirmative defense. This approach assumes that the employer had multiple motives. If, on the other hand, the case is deemed a "pretext" case, it relies upon the *McDonnell Douglas* shifting burdens at summary judgment, and at trial requires proof that an illegal reason was "a determining factor" or "but-for" cause for the adverse action. This approach falsely assumes a single employer motive. The distinction recognized between single-motive and multiple-motive cases is illusory. Neither model forecloses the existence multiple motives.

In virtually every employment discrimination case, the employer offers a legitimate non-discriminatory reason for its adverse action. In every case the jury may decide 1) that the legitimate reason motivated the employer, and that the illegal reason did not; 2) that the illegal reason motivated the employer and the legitimate reason did not; *or* 3) that both the illegal and legitimate reason motivated the employer.

In this sense, every case is *potentially* a multiple or mixed-motive case. The "motivating-factor" or "but-for" standard of causation has nothing whatever to do with the number of motives. Under no recognized standard must an employee prove that an illegal reason was the only reason for an adverse action.[5] Likewise, the probative value of direct evidence or a subjective judgment about the strength of Plaintiff's case is completely unaffected by the number of motives.

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[5] When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse*, 490 U.S. at 241 n.7 (Brennan, J., plurality opinion) *citing* 110 Cong. Rec. 2728, 13837 (1964). Accordingly, in numerous cases under the ADEA courts have routinely instructed juries that in order to prevail "age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference.'" *E.g.*, *Graham v. Dresser Indus. Inc.*, 928 F.2d 408, 408 (9th Cir. 1991) ("To constitute an ADEA violation, age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be 'a determining factor' or 'make a difference'") (citing Ninth Circuit cases); *Golomb v. Prudential Ins. Co.*, 688 F.2d 547, 550 (7th Cir. 1982) ("We agree that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.*, 3 F.3d 1419, 1426 n.3 (10th Cir. 1993) (Recognizing a proper instruction under *McDonnell Douglas*: "[A] plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age").

Some courts continue erroneously to distinguish the standard for causation based upon the number of motives. *E.g. Ginger v. District of Columbia,* 527 F.3d 1340, 1346 (D.C. Cir. 2008) (distinguishing between single-motive and mixed-motive type cases); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (distinguishing between "single-motive" cases requiring "but-for" causation, and "mixed-motive" cases requiring "motivating-factor" causation, subject to same decision affirmative defense); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 706 (6th Cir. 2006)("Title VII single-motive claims proceeding on circumstantial evidence are analyzed under the burden-shifting framework set forth in *McDonnell Douglas*").

The plain language of the Civil Rights Act of 1991 makes no distinction between cases involving a single motive or multiple motives. The language of the statute does not allow for the application of the motivation factor standard *only* when other factors also motivated the practice. It applies *even though* or *regardless* of whether other factors motivate the practice. 42 U.S.C. § 2000e-2(m). The same standard should apply to cases filed under the ADEA.

B. Plaintiff Should Be Given a Choice of Which Model to Use.

Shifting burdens, whether a burden of production or persuasion, is often seen as confusing to juries. To avoid that confusion, a Plaintiff may choose to assume at trial the more difficult "a determining factor" standard of causation. By assuming the burden of proving "but-for" causation the same decision affirmative defense becomes unnecessary. This Plaintiff's choice does not compromise the single and uniform "motivating factor" standard. It is non-

prejudicial to the Defendant and has the salutary effect of avoiding jury confusion. (*See* Pet'r Br. 15 n.23.)

In *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the Court erroneously used the "single-motive"/"mixed-motive" terminology to distinguish between cases that require proof that an adverse action was taken "because of" gender and cases where gender was a "motivating factor." Notwithstanding that confusion, the Court acknowledged that Plaintiff had a choice of which theory to utilize. *Id.* at 1240. In order to preserve the class action format, Plaintiff chose the "a determining-factor" standard; "[t]his means that Wal-Mart is not entitled to present a 'same decision defense' because such a defense at the remedy stage applies only where the conduct was the result of 'mixed motives.'" *Id.* at 1241 (citation and footnote omitted). *See also Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005) ("a plaintiff may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant's decision, *or* alternatively may establish a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*") (citation omitted); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) ("A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision. . . . Alternatively, a plaintiff may 'proceed under [the *McDonnell Douglas*] 'pretext' framework") *quoting Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004) (en banc).

In every case, Plaintiff should be allowed to prove that an illegal reason was a motivating factor, with the burden on the Defendant to prove that it would have made the same decision even without consideration of the protected characteristic. Plaintiff should be allowed the choice to prove "but-for" causation.

CONCLUSION

Direct evidence is not required for a motivating-factor jury instruction. The Court should reject this and other arbitrary criteria and adopt a single standard to be applied in all cases.

Respectfully submitted this 2nd day of February 2009.

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AMICUS CURIAE BRIEF

No. 08-441

IN THE

Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents an underlying membership of over three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including in *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioner and respondent have filed letters with the Clerk's Office consenting to the filing of amicus briefs in support of either party.

53 (2006); and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

The Chamber's members have a substantial interest in the issues that this case presents regarding the burden of persuasion under the Age Discrimination in Employment Act. As explained below, this Court should take this opportunity to rectify the confusion in lower courts produced by the splintered opinions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Court should clarify that the various opinions in *Price Waterhouse* address the unusual issue of proving causation in fact where the challenged employment decision was made by a multi-member decisionmaking body in which some, but not all, members may have acted on discriminatory grounds. In that circumstance, consistent with the common law of torts, once a plaintiff proves that unlawful discriminatory animus actually caused the challenged action, *Price Waterhouse* affords a defendant an affirmative defense that requires the defendant to prove that it would have taken the same employment action even absent impermissible bias on the part of one or more of its agents. But *Price Waterhouse* has nothing to do with the vast majority of age-discrimination cases where a single plaintiff claims that a single decisionmaker took an unlawful action. And *Price* Waterhouse plainly does not apply where, as here, a plaintiff offers a prima facie case and attacks a single decisionmaker's non-discriminatory explanation for the challenged employment action as pretextual, providing no other evidence of discrimination. In such a quintessential *Burdine-McDonnell Douglas* case, the plaintiff retains, at all times, the burden of

proving that the defendant discriminated on the basis of age.

SUMMARY OF ARGUMENT

The question raised by this ADEA case is whether, and if so in what circumstances, a court may properly shift the burden of persuasion to the defendant-employer to show that unlawful age bias did not cause the employment action in issue. Petitioner complains that the court below erred in holding that the burden of persuasion on the issue of causation may shift only where a plaintiff is able to "present direct evidence of discrimination." But the court below rendered no such holding, and its conclusion that burden-shifting is not allowed in this case was entirely proper.

1. In accordance with the common law of torts and the conventional civil-litigation rule that plaintiffs must prove their cases, this Court has consistently required plaintiffs bringing suit under the ADEA to carry the burden of proving that the defendant discriminated on the basis of age. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

2. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), six Justices (albeit without producing a single majority opinion) recognized a narrow exception to this rule. *See id.* at 252-53 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276-77 (opinion of O'Connor, J.). There, the challenged employment decision was made by a multi-member body (a partnership admissions committee), not by a single company supervisor or manager. *Id.* at 232-33

(opinion of Brennan, J.). Therefore, rather than presenting a binary question of intent, *Price Waterhouse* presented the fact-finder with a complex problem of multiple causation: which of the multiple grounds—both discriminatory and non-discriminatory—on which the individual members of the decisionmaking body acted was decisive in producing the challenged employment decision? In that limited circumstance, in accordance with common-law tort cases and other precedents allowing burden-shifting in multiple-causation contexts, the six Justices forming the majority in *Price Waterhouse* concluded that once a plaintiff proves that unlawful bias was a substantial factor in the challenged decision, the defendant is entitled to an affirmative defense against liability if it nonetheless proves that it would have taken the same employment action even absent discrimination.

3. This case falls squarely within the conventional rule requiring the plaintiff to carry the burden of proving that the defendant discriminated on the basis of age. This case does not involve multiple forces that allegedly caused the challenged employment action, thus raising the particular problems of proving causation with which *Price Waterhouse* was concerned. Rather, it was a quintessential single-decisionmaker pretext case in which the central issue was whether or not the non-discriminatory explanation for the challenged employment action offered by Petitioner's supervisor, and the supervisor's denials that bias played *any* role in the challenged decision, should be believed. Indeed, not only is the *Price-Waterhouse* framework inapposite in the context of this single-decisionmaker case, but it was clear error for the district court to

have inserted an affirmative defense into the case that the defendant had not raised, and to which the defendant had in fact objected. The Eighth Circuit correctly held that the district court erred by shifting the burden of persuasion to the defendant in such a case.

4. Any other construction of *Price Waterhouse* would shift the burden of persuasion to defendants in virtually every ADEA case, contrary to the statutory text and well-settled rules concerning the burden of proof in civil litigation. Accordingly, the Court should resolve any ambiguity in the meaning of the fractured *Price Waterhouse* opinions by holding that *Price Waterhouse* is limited to unique cases involving the unusual problem of multiple causation, such as the situation presented by *Price Waterhouse* itself. Alternatively, the Court should abandon *Price Waterhouse* altogether and hold that ADEA plaintiffs bear the burden of proof at all times.

ARGUMENT

I. AGE-DISCRIMINATION PLAINTIFFS BEAR THE BURDEN OF PERSUASION, EXCEPT IN THE UNUSUAL CIRCUMSTANCE WHERE MULTIPLE FORCES CAUSED THE CHALLENGED EMPLOYMENT ACTION

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). As this Court has made clear, when an employee alleges disparate treatment "because of" age in violation of this statute, "'liability depends on whether the

protected trait (under the ADEA, age) actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). Hence, a plaintiff must prove that his age "'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Id.* (quoting *Hazen Paper*, 507 U.S. at 610) (alterations in original).

In assessing ADEA claims, both this Court and lower courts have consistently applied proof standards and procedures adopted in precedent cases interpreting identical language in other employment discrimination statutes, such as Title VII of the Civil Rights Act of 1964, which prohibits discrimination "because of [the employee's] race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1). *See Reeves*, 530 U.S. at 141-42; *Hazen Paper*, 507 U.S. at 612 (describing Title VII decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), as "creating proof framework applicable to ADEA"). This case law, and the common-law background from which it draws, makes plain that, outside of unusual circumstances addressed in *Price Waterhouse* and not applicable here, ADEA plaintiffs bear the burden of proving that age was both the but-for and proximate cause of the challenged employment decision. *See, e.g., Reeves*, 530 U.S. at 141; *Hazen Paper*, 507 U.S. at 610.

A. This Court's Precedents, Consistent with the Common Law of Torts, Ordinarily Require Plaintiffs to Carry the Burden of Persuasion Under the ADEA

Under the common law of torts, the general rule is that "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." RESTATEMENT (SECOND) OF TORTS § 433B(1) (1965); *see also, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (1993) (describing the "conventional rule of civil litigation" that the plaintiff must "prove his case by a preponderance of the evidence" (internal quotation marks and alterations omitted)).

In accordance with the common law, this Court has established a familiar framework for evaluating evidence of discriminatory intent in the typical employment discrimination case, where a single decisionmaker was responsible for the challenged employment action and the factual dispute between the parties turns on whether that decisionmaker bore discriminatory animus toward the plaintiff and whether such bias played a determinative role in the decision. In such cases, the plaintiff bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. This burden requires the plaintiff to prove that he or she "applied for an available position for which [he or she] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Tx. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *see also, e.g., McDonnell Douglas*, 411 U.S. at 802. Once the plaintiff establishes such a prima facie case, the

burden of production shifts to the employer to "rebut the presumption of discrimination [raised by the plaintiff's prima facie case] by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254.

The employer's burden, however, is one of production only, not persuasion; the employer need not even "persuade the court that it was actually motivated by the proffered reasons." *Id.*; *see also, e.g.*, *Reeves*, 530 U.S. at 142. Instead, so long as "the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff," the burden shifts back to the plaintiff to persuade the trier of fact that the defendant's asserted non-discriminatory reasons for the action are a pretext and thus that impermissible discrimination was the true reason for the employer's adverse treatment of the plaintiff. *Burdine*, 450 U.S. at 254-56. At this stage, the plaintiff's burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

Throughout this three-stage process, as this Court has repeatedly emphasized, "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 253); *see*

also, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). Thus, in *Aikens*, the Court held that whether or not a plaintiff established a prima facie case of discrimination is "no longer relevant" once both parties have presented their evidence. *Aikens*, 460 U.S. at 715. At that stage, the trier of fact must evaluate "directly" the question whether intentional discrimination occurred, "just as district courts decide disputed questions of fact in other civil litigation." *Id.* at 715-16. As the Court explained, while "the question facing triers of fact in discrimination cases is both sensitive and difficult," "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact" on which plaintiffs bear the burden of proof. *Id.* at 716; *see also St. Mary's Honor Ctr.*, 509 U.S. at 511.

B. This Court's Precedents and the Common Law Recognize a Limited Exception That Shifts the Burden of Persuasion to Defendants in Certain Cases of Multiple Causation

It is true that, in a line of cases culminating in *Price Waterhouse*, this Court has concluded that, in limited circumstances, a defendant may avoid liability only by proving that it would have taken the same employment action even absent discrimination. But, properly understood, both by reference to their common-law antecedents and on their own terms, *Price Waterhouse* and the cases leading up to it are entirely compatible with the Court's holding that, in single-plaintiff cases challenging a single actor's

decision, the burden of persuasion remains with the plaintiff at all times.

1. The common law of torts recognizes a limited exception shifting the burden of persuasion to a defendant in certain cases of multiple causation. As the Second Restatement of Torts explains, "[w]here the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." RESTATEMENT (SECOND) OF TORTS § 433B(3); *see also* RESTATEMENT (THIRD) OF TORTS § 28 (Proposed Final Draft No. 1, 2005) (indicating that although the plaintiff normally has the burden of proving causation, "the burden of proof, including both production and persuasion, on factual causation is shifted to the defendants" when one or more tortfeasors caused the harm and "the plaintiff cannot reasonably be expected to prove which actor caused the harm"). The rationale for this exception "is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." RESTATEMENT (SECOND) OF TORTS § 433B cmt. f.

The famous case of *Summers v. Tice*, 199 P.2d 1, 1-2 (Cal. 1948), illustrates these principles. There, two hunters fired their guns simultaneously and one of them struck the plaintiff, but the plaintiff could not prove which one it was. *Id.* at 1-2. Noting that "[t]o hold otherwise would be to exonerate both [hunters]

from liability, although each was negligent, and the injury resulted from such negligence," the court in *Summers* required that, in the unusual circumstances of that case, "the burden of proof . . . be shifted" to each defendant to show that his own individual negligence did not cause the plaintiff's injury. *Id.* at 3-4 (emphasis and internal quotation marks omitted). *See also, e.g., Richman v. Sheahan*, 512 F.3d 876, 884-85 (7th Cir. 2008) (indicating that defendants are jointly and severally liable where "it is unclear which defendant's act was the one that inflicted the injury"); *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 218 (6th Cir. 1974) (holding in nuisance suit based on pollution from multiple plants that the burden of proof may shift to the defendants to show "which one was responsible and to what degree").

These principles also may apply when a tortfeasor's action merges with another, independent cause of the plaintiff's injury, thus making it difficult for the plaintiff to prove that the defendant's action was a necessary cause of the plaintiff's injury. In *Kingston v. Chicago & Northwestern Railway Co.*, 211 N.W. 913, 915 (Wis. 1927), for example, where a fire negligently set by the defendant merged with another fire of unknown origin before the combined fire destroyed the plaintiff's home, the court placed the burden on the defendant to show that its fire was not the cause of the plaintiff's injury. *Id. See also, e.g., Richman*, 512 F.3d at 884 (indicating that tort defendants are jointly and severally liable where each defendant "might by his own act have inflicted the entire injury"); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 112 (D.D.C. 2006) (holding that "factual causation will not be defeated" where a

defendant's conduct more likely than not "would have led" to the plaintiff's injury, even if an "intervening event" also "would itself have been sufficient to produce the harm"), *aff'd*, 531 F.3d 884 (D.C. Cir. 2008).

Thus, although tort plaintiffs ordinarily must prove all elements of their claims, including any required elements of intent and causation, the common law has recognized a narrow exception to this rule in circumstances where multiple causation makes it unusually difficult for the plaintiff to prove that a defendant's misconduct caused the plaintiff's injury.

2. In the line of cases culminating in *Price Waterhouse*, this Court applied a similar burden-shifting framework to situations in which multi-member bodies make decisions that are challenged as discriminatory. Such cases present problems analogous to those in tort law concerning causation where multiple forces are at play.

For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court held that the burden of persuasion could be shifted to the defendant if the plaintiff established that a multi-member municipal board's zoning decision was "motivated in part by a racially discriminatory purpose." *Id.* at 271 n.21. Although the Court there concluded that the plaintiff had failed to carry this initial burden, it observed that, if the plaintiff's showing had been adequate, the burden would have shifted to the town to "establish[] that the same decision would have resulted even had the impermissible purpose not been considered." *Id.*

Similarly, in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court held that, once a teacher showed that First Amendment activity was a "substantial" or "motivating" factor in a multi-member school board's decision not to rehire him, the burden shifted to the board to establish that "it would have reached the same decision as to [the teacher's] reemployment even in the absence of the protected conduct." *Id.* at 287.

Further, in *Hunter v. Underwood*, 471 U.S. 222 (1985), in which plaintiffs challenged a felon-disenfranchisement provision of a state constitution as racially discriminatory, the Court held that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228; *see also Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (applying *Mt. Healthy* burden-shifting framework to termination of contractor by multi-member county board). As the Court observed in *Hunter*, "[p]roving the motivation" behind the action of a multi-member official body "is often a problematic undertaking," in part because "'[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.'" 471 U.S. at 228 (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)).

Although the Court produced no unified majority opinion in *Price Waterhouse*, the opinions embraced by six Justices in that case fall squarely within this line of precedent. There, as noted, two multi-member

bodies—the partnership's Admissions Committee and Policy Board—bore responsibility for the challenged promotion decision. 490 U.S. at 232-33 (opinion of Brennan, J.). And while there was evidence that "some of the partners reacted negatively to [the plaintiff's] personality because she was a woman," and opposed plaintiffs' promotion on that ground, there was also evidence that other partners may have opposed the plaintiff's promotion for non-discriminatory reasons (*i.e.*, because she had interpersonal difficulties with staff members). *Id.* at 234-35. The Court in *Price Waterhouse* thus confronted a classic problem of multiple causation: multiple forces, some lawful and some not, may have caused the challenged employment action, making it unusually difficult for the plaintiff to prove which force was decisive. In that limited circumstance involving multiple forces, once the plaintiff proved that gender actually caused the action of one or more members of the multi-member decisionmaking body, six Justices concluded that the defendant could avoid liability only by proving that it would have taken the same employment action even absent discrimination. *See id.* at 252-53 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276-77 (opinion of O'Connor, J.).

Indeed, Justice Brennan, writing for a plurality of the Court, spoke expressly in terms of multiple causation. Analogizing the facts of *Price Waterhouse*, where multiple forces allegedly influenced the employer's action, to a situation where "two physical forces act upon and move an object" and "either force acting alone would have moved the object," Justice Brennan observed that gender discrimination may have been a cause of the employer's action in *Price*

Waterhouse even if there were other causes as well. *Id.* at 241 (opinion of Brennan, J.). He thus concluded that, once the plaintiff proved that gender was an actual, causative force in the employment action, the employer could prevail only by proving that it would have reached the same decision absent discrimination. *Id.* at 252.

Justice White likewise explained the Court's result by invoking the Court's prior cases addressing decisions of multi-member bodies. In his view, *Mt. Healthy* dictated the result in *Price Waterhouse*, since in *Mt. Healthy*—another case involving multiple decisionmakers—"the District Court found that the employer was motivated by both legitimate and illegitimate factors." *Id.* at 259 (opinion of White, J.). Because the plaintiff in *Price Waterhouse* had made a comparable showing, the employer could defeat liability only by "prov[ing] 'by a preponderance of the evidence that it would have reached the same decision . . . in the absence of' the unlawful motive." *Id.* (quoting *Mt. Healthy*, 429 U.S. at 287) (ellipsis in original).

In her separate opinion—viewed by the Eighth Circuit here as controlling, Pet. App. 5a—Justice O'Connor also expressly identified the multiple-causation underpinnings of the Court's holding. Citing both *Summers* and *Kingston*, Justice O'Connor observed that "the law has long recognized that in certain 'civil cases' leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care." *Id.* at 263 (opinion of O'Connor, J.) (internal quotation marks omitted). Further, Justice O'Connor invoked

Arlington Heights, describing it as "a case which, like this one, presented problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions." *Id.* at 268. Based on these analogies, and because the plaintiff showed "by direct evidence that an illegitimate criterion was a substantial factor in the decision," Justice O'Connor concluded that the employer could prevail only by carrying its burden of establishing the affirmative defense that it would have taken the same employment action even absent impermissible forces. *Id.* at 276.

3. In short, all three of the opinions in *Price Waterhouse* draw on common-law principles concerning multiple causation in concluding that, in a limited class of cases, the defendant may avoid liability only by showing that it would have taken the same employment action even absent discrimination. Those common-law principles allow such a burden-shift, however, only where the plaintiff shows that multiple independent forces may have caused the injury, such as where a multi-member decisionmaking body is involved, and the plaintiff first proves that a prohibited criterion actually caused the action of one or more members of that body.

As described above, all three opinions spoke in terms of multiple causation. *See id.* at 252 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 263, 276 (opinion of O'Connor, J.). And all three permitted burden-shifting only after the plaintiff persuades the trier of fact that a prohibited criterion was one of the actual causes of the challenged

decision. *See id.* at 246-48 (opinion of Brennan, J.); *id.* at 259 (opinion of White, J.); *id.* at 276 (opinion of O'Connor, J.). In this context, where multiple causative forces are at work in an employment decision by a multi-member body, Justice O'Connor's frequently misunderstood statement that a plaintiff must prove by "direct evidence that an illegitimate criterion was a substantial factor in the decision" is obviously not a reference to a need for non-circumstantial evidence, but rather to a need for substantial proof—"strong[er]" than mere "stray remarks" or "statements . . . unrelated to the decisional process itself"—that unlawful bias was at least one of the multiple independent forces responsible for the adverse action at issue. *Id.* at 276-77 (opinion of O'Connor, J.).

This understanding of *Price Waterhouse* and its antecedents is further informed by the insistence of all six Justices in the *Price Waterhouse* majority that *Price Waterhouse* does not supplant the *Burdine-McDonnell Douglas* framework, and that *Price Waterhouse* applies only to a narrow group of employment discrimination cases. *See Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.). In both *Price Waterhouse* and other opinions, the Court has distinguished between, on the one hand, pretext cases that turn on whether the defendant is to be believed concerning "the 'true' motives behind the [challenged] decision," and on the other hand, those relatively rare cases in which the central issue is which of several independent forces caused the employment action at issue. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 & n.5 (1983) (distinguishing burden-shifting in multiple-force

cases from "pretext case[s]" controlled by the *Burdine-McDonnell Douglas* framework), *abrogated on other grounds by Director v. Greenwich Collieries*, 512 U.S. 267 (1994); *see also Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.).

Moreover, the burden of persuasion does not shift to the defendant in a pretext case merely because a single decisionmaker may have considered multiple factors—even unlawful factors—in reaching the challenged employment decision. Indeed, in requiring a plaintiff to prove that age "actually played a role in [the decisionmaking] process and had a determinative influence on the outcome," the Court in *Hazen Paper* (which was decided after *Price Waterhouse*) contemplated that age may not be the *sole* factor at play in a case subject to the *Burdine-McDonnell Douglas* framework. *Hazen Paper*, 507 U.S. at 610; *see also Reeves*, 530 U.S. at 141. Thus, *Price Waterhouse* applies only to the unusual case presenting the need to sort out the effects of multiple causes of an employment decision, such as cases involving multi-member decisionmaking bodies. It does not change the burden of persuasion in pretext cases, including those in which a single decisionmaker may consider multiple factors.

C. The Eighth Circuit Correctly Held That the District Court's Jury Instructions Improperly Placed the Burden of Persuasion Concerning Causation on Respondent

This case falls squarely within the *Burdine* line of cases, which required Petitioner to bear the burden of proof at all times. It does not present the unusual

circumstances in which *Price Waterhouse* contemplated that a defendant is entitled to an affirmative defense against liability if it proves that it would have taken the same employment action even absent discrimination. Indeed, Petitioner never produced evidence of discrimination beyond his prima facie case and his attacks on Respondent's non-discriminatory explanation for his reassignment, and Respondent never even sought to assert the *Price Waterhouse* affirmative defense.

This matter was a quintessential pretext case. Petitioner argued that his supervisor, Andy Lifland, demoted him because of his age, as purportedly evidenced by the alleged lack of any other reason for his demotion and by the fact that other employees in Petitioner's department over the age of 50 were also demoted at the same time. Compl. ¶¶ 13, 15-16; J.A. 6; Tr. 694, 701, 740-41, 746. Respondent argued that Lifland reassigned Petitioner to a position that better fit his skills and abilities, and that age had nothing to do with the reassignment.[2] Tr. 123-24, 126, 432, 437-38, 507, 532-33. The case thus turned on whether Respondent's explanation for Petitioner's reassignment was pretextual—that is, on whether or not Lifland should be believed about his "'true' motives behind the [challenged] decision."[3] *Transp.*

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[2] While Lifland was supported by Steve Wittmuss, his "second in command," Tr. 444, Lifland made the ultimate decision to reassign Petitioner.

[3] A plaintiff alleging age discrimination must establish both that unlawful motivation caused an adverse employment action (*i.e.*, but-for causation) and that the defendant-employer is legally responsible for that discriminatory motivation (*i.e.*, proximate causation). *See, e.g., Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544-45 (1999); *Faragher v. City of Boca Raton*, 524

Mgmt., 462 U.S. at 400 n.5. The case raised none of the issues concerning multiple causation with which *Price Waterhouse* was concerned.

Indeed, as Justice Brennan recognized in *Price Waterhouse*, the showing that an employer would have taken the same employment action even absent discrimination "is most appropriately deemed an affirmative defense" to be invoked by the employer. *Price Waterhouse*, 490 U.S. at 246 (opinion of Brennan, J.); *see also Transp. Mgmt.*, 462 U.S. at 400. But Respondent never invoked that affirmative defense in this case. Petitioner simply made a prima facie case and attacked Respondent's explanation for the reassignment as pretextual; he never presented evidence that would have prompted Respondent to invoke its affirmative defense under *Price Waterhouse*. Respondent, in turn, argued only that age played no role in the decision to reassign Petitioner; it never argued in the alternative that, even if bias played a role in Lifland's decision, Lifland would have made the same decision even absent discrimination. *See* J.A. 6; Tr. 711-36.

The *Burdine* framework, in which the plaintiff bears the burden of persuasion at all times, not the *Price Waterhouse* framework, therefore applied to this case. *See Price Waterhouse*, 490 U.S. at 247 (opinion of Brennan, J.); *id.* at 260 (opinion of White, J.); *id.* at 261 (opinion of O'Connor, J.); *see also*

(continued...)

U.S. 775, 805-06 (1998); *see also, e.g., Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998). Only the former is at issue here.

Transp. Mgmt., 462 U.S. at 400 n.5. But, by instructing the jury that petitioner needed only to show that age was a "motivating factor" in the employer's decision to demote him, at which point the employer could prevail only by "prov[ing] by a preponderance of the evidence that [it] would have demoted plaintiff regardless of his age," Pet. App. 6a (internal quotation marks omitted), the district court improperly shifted the burden of persuasion to the defendant on the ultimate question of whether the employer, acting through Petitioner's supervisor, discriminated on the basis of age. As the Eighth Circuit correctly recognized, "[t]he burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in [the employer's] employment action." Pet. App. 7a.

Indeed, not only is the *Price-Waterhouse* framework inapposite in the context of this single-decisionmaker case, but it was clear error for the district court to have inserted an affirmative defense into the case that the defendant had not raised, and to which the defendant in fact objected because the plaintiff failed to present any evidence that would have justified moving outside the *Burdine-McDonnell Douglas* framework.

Petitioner's argument that the Eighth Circuit erred in requiring him to prove his case through "direct" rather than "circumstantial" evidence of discrimination attacks a straw man. Br. for Petr. at 16-25. The Eighth Circuit did not distinguish direct from circumstantial evidence, but rather required, as a prerequisite to the application of the *Price*

Waterhouse framework, "evidence showing a specific link between the alleged discriminatory animus and the challenged decision . . . ." Pet. App. 5a (internal citations omitted). Moreover, while the Eighth Circuit's decision below may reflect some of the widespread confusion among the courts of appeals about the precise meaning of the splintered opinions in *Price Waterhouse*, its judgment is plainly correct. The district court erred in shifting the burden of persuasion on the causation issue to the defendant in this quintessential single-actor pretext case, which did not involve alleged multiple independent causative forces and in which Respondent did not invoke the affirmative defense afforded in limited circumstances by *Price Waterhouse*.

II. TO THE EXTENT THAT THE MEANING OF THE *PRICE WATERHOUSE* OPINIONS IS AMBIGUOUS, THE COURT SHOULD NOT CONSTRUE *PRICE WATERHOUSE* TO PERMIT SHIFTING THE BURDEN OF PERSUASION TO DEFENDANTS IN SINGLE-DECISIONMAKER CASES

To the extent that the meaning of the splintered opinions in *Price Waterhouse* is ambiguous, the Court should resolve the ambiguity by holding that *Price Waterhouse* is limited to unique cases involving the unusual problem of multiple causation presented by *Price Waterhouse* itself. A broad reading of *Price Waterhouse* that allows district courts to shift the burden of persuasion to defendants in cases involving single decisionmakers taking single employment actions would be unworkable and would contravene the statutory text and this Court's precedents.

As Justice Kennedy predicted in his *Price Waterhouse* dissent, "[c]onfusion in the application of dual burden-shifting mechanisms"—*Burdine-McDonnell Douglas* and *Price Waterhouse*—has been "acute." 490 U.S. at 292 (Kennedy, J., dissenting). The jury instructions here are a case in point. Even though there was no evidence of a multi-member decisionmaking body or other unusual circumstance creating special problems of proof due to multiple causation, the district court placed the burden of persuasion on the defendant to prove that it would have demoted petitioner "regardless of his age," so long as petitioner showed that age was a "motivating factor" in the demotion. Pet. App. 6a.

This approach would support shifting the burden of persuasion in circumstances far afield from the facts of *Price Waterhouse*. In some sense, nearly every contested ADEA case involves evidence of multiple "motivating factors," *i.e.*, "mixed motives"—on the one hand, there is evidence (such as the plaintiff's prima facie case) suggesting a discriminatory intention, while on the other hand the employer asserts that non-discriminatory factors (which the plaintiff alleges were pretextual) support its decision. Thus, if such a showing sufficed to shift the burden of persuasion to the defendant, then this Court's repeated admonition in applying the *Burdine-McDonnell Douglass* framework that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *Burdine*, 450 U.S. at 253, would be a dead letter, for in practice the plaintiff would almost never bear the burden of persuasion on the central issue of discrimination. Indeed, the entire *Burdine-*

McDonnell Douglass framework itself would rarely be applicable, as almost all contested cases would instead be governed by the *Price Waterhouse* framework. While statutes and administrative agencies sometimes depart from the common law presumptions about causation, *see, e.g.*, 42 U.S.C. § 2000e-2(m); *Transp. Mgmt.*, 462 U.S. at 400, this Court has indicated that, absent such express direction from Congress or a responsible administrative agency to which deference is due, it will construe statutes consistent with common-law causation principles. *See supra* at 5-18. As Respondent argues at length, the construction of *Price Waterhouse* urged by Petitioner is inconsistent with the text and purpose of the ADEA and with conventional rules of civil litigation. *See* Br. for Resp. at 18-40.

Thus, *Price Waterhouse* should be construed to apply only where special circumstances such as a multi-member decisionmaking body create a problem of multiple causation. In the alternative, if the Court interprets *Price Waterhouse* to apply beyond its unique facts, the framework prescribed by the splintered opinions in that case should be abandoned altogether, as it contravenes the statutory text and this Court's other precedents, and has only yielded confusion and unpredictability in lower courts.

CONCLUSION

The Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-441

IN THE

Supreme Court of the United States

JACK GROSS,
Petitioner,

v.

FBL FINANCIAL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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IN THE

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondent before this Court in favor of affirmance.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other federal employment-related laws and regulations. As employers, and as potential defendants to claims asserted under these laws, EEAC members have a substantial interest in the issue presented in this case regarding the scope and applicability of this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), to non-Title VII cases. Specifically, EEAC has a direct and ongoing interest in the question of when, if ever, it is appropriate to shift the burden of proof regarding causation to an employer-defendant in a non-Title VII employment discrimination case.

EEAC seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief this Court on the concerns of

the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Jack Gross has worked in various capacities for FBL Financial Group, Inc. (FBL) and/or its predecessor company since 1987. Pet. App. 2a. In 1999, at the age of 51, Gross was promoted to the position of Claims Administration Vice President. *Id.* As a result of two corporate reorganizations, Gross was reassigned to the position of Claims Administration Director in 2001, and in 2003, to the position of Claims Project Coordinator. *Id.* Many of the duties Gross had performed as Claims Administration Director were transferred to the newly created Claims Administration Manager position, which was given to Lisa Kneeskern, an employee in her early forties. *Id.* at 7.

Gross brought an action in the U.S. District Court for the Southern District of Iowa claiming that FBL demoted him because of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*. *Id.* at 3a. Over FBL's objection, the trial court gave a mixed-motive jury instruction providing that Gross had the burden of proving that he was demoted and that age was a motivating factor in the demotion decision. *Id.* The trial court went on to instruct the jury that a defense verdict would be warranted if FBL could prove "'by a preponderance of the evidence that [it] would have demoted [Gross] regardless of his age.'" *Id.* at 6a. The jury returned a verdict for Gross in the amount of $46,945, representing compensation for lost wages. *Id.* at 3a.

FBL filed post-trial motions for judgment or, in the alternative, for a new trial, arguing among other

things that Gross failed to present any direct evidence of age discrimination, and all of the decision makers testified that age was not a factor in the employment decision. *Id.* The district court denied FBL's motions, concluding that despite the absence of any direct evidence of discrimination, there was "ample circumstantial evidence presented during trial that FBL intentionally discriminated against Gross based on his age." *Id.* at 25a. It pointed out that Gross himself testified that "the only common thread" linking the people affected by the reorganization was age, and that "everybody over 50" was impacted. *Id.* The district court found that "an *inference* of age discrimination is raised by the decision to place Kneeskern in the claims administration manager position instead of Gross." *Id.* (emphasis added). It also found that there was sufficient evidence for the jury to find that the company's stated reason for reassigning Gross to the Claims Project Coordinator position — that "it was a good fit for his strengths and weaknesses" — was false and a pretext for unlawful discrimination, because at the time the demotion decision was made, "there was no defined position for Gross to 'fit' into." *Id.* at 28a.

FBL appealed the decision to the Eighth Circuit, which found that the district court erred in providing a mixed-motive instruction to the jury where no direct evidence of age discrimination was presented. *Id.* at 3a. It determined that the approach to allocating the burden of proof articulated by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applies to mixed-motive age discrimination cases, noting that Justice O'Connor's concurrence is viewed as "the controlling opinion that sets forth the governing rule of law" in such cases. *Id.* at 5a.

Applying that rule, the Eighth Circuit found that "to justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show by direct evidence that an illegitimate factor played a substantial role in the employment decision." *Id.* (citations and quotations omitted). "Direct evidence," it continued, must consist of more than "stray remarks" or "statements by non decision makers" suggesting a discriminatory motivation. *Id.* Rather, "[d]irect evidence for these purposes is evidence showing a specific line between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that the illegitimate criterion actually motivated the adverse employment action." *Id.* (citations and quotations omitted). Absent such a showing, the Eighth Circuit found, the burden-shifting analysis that this Court first established in the *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) applies, under which the burden of persuasion "remains with the plaintiff throughout . . . ." *Id.* at 4a. Because Gross failed to present any direct evidence of age discrimination, the Eighth Circuit concluded that the district court's mixed-motives jury instruction was improper. *Id.* at 6a.

In doing so, the Eighth Circuit soundly rejected Gross' contention that both § 107 the Civil Rights Act of 1991 — which amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, to, among other things, codify a "motivating factor" burden-shifting approach applicable to mixed-motive cases — and *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) — which held that direct evidence is not required in order to proceed on a mixed-motive theory under Title VII — supersede *Price Waterhouse*. *Id.* at 8a-10a. It observed that § 107

applies only to Title VII and does not affect claims arising under the ADEA. *Id.* at 8a. The appeals court also pointed out that this Court in *Desert Palace* expressly declined to rule on whether direct evidence is required in order to obtain a mixed-motive jury instruction in non-Title VII cases. *Id.* at 10a. It thus reversed and remanded the case for a new trial. Gross petitioned for a writ of certiorari, which this Court granted on December 5, 2008.

SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, bars employers from discriminating against an employee "because of such individual's age." 29 U.S.C. § 623(a). Under the familiar burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a plaintiff seeking to prove unlawful intentional discrimination using circumstantial evidence must demonstrate that the employer's stated nondiscriminatory explanation for the challenged employment decision is a pretext for discrimination. 411 U.S. at 802 (footnote omitted); *see also* St. *Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08 (1993).

In *Price Waterhouse v. Hopkins*, a plurality of this Court ruled that where a plaintiff proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq.* 490 U.S. at 250. Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without having considered the protected characteristic. *Id.* at 249. This so-called "mixed-motive"

analysis thus shifts the burden of proof regarding causation to the employer after the plaintiff shows, by direct evidence, that a protected characteristic was a motivating factor in the employment decision.

Two years after *Price Waterhouse* was decided, Congress enacted the Civil Rights Act of 1991 (CRA), P.L. 102-166, which established a "motivating factor" test applicable to mixed-motive cases brought under Title VII. Specifically, § 107 of the 1991 Act provides that after a plaintiff "demonstrates that race, color, religion, sex or national origin was a motivating factor" — along with other, legitimate considerations — for "any employment practice," 42 U.S.C. § 2000e-2(m), the employer may significantly limit its liability for damages stemming from the discrimination by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor . . . ." 42 U.S.C. § 2000e-5(g)(2)(B). Section 107 did not similarly amend the ADEA or any other non-Title VII employment nondiscrimination law.

This Court recognized the limited scope of the 1991 amendments in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a Title VII case. There, it interpreted the "motivating factor" test as permitting Title VII plaintiffs to obtain a mixed-motive jury instruction even in the absence of direct evidence of discrimination. Because § 107 of the CRA did not incorporate the "motivating factor" test into the ADEA, however, the Court's subsequent analysis in *Desert Palace* of that provision simply does not apply, and should not be extended, to age discrimination claims. Indeed, the Court expressly declined to extend its holding in *Desert Palace* beyond the Title VII context.

Despite sharing a common goal of eradicating employment discrimination, Title VII and the ADEA

differ in a number of significant ways, further making § 107 and this Court's interpretation of it in *Desert Palace* plainly inapplicable to age discrimination claims. This Court has observed repeatedly that these differences justify applying the two statutes differently in certain circumstances. *See, e.g., Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005).

Price Waterhouse was decided in the context of Title VII, not the ADEA, and this Court never has expressly extended its holding in that case to intentional age discrimination cases. Even assuming that *Price Waterhouse* does apply to ADEA claims, however, the ultimate burden of proving unlawful discrimination nevertheless should always remain squarely with the plaintiff, unless and until direct evidence is presented demonstrating that the employer took the challenged employment action "because of" the plaintiff's age. As this Court observed last Term, "'[w]hatever the employer's decisionmaking process,' a plaintiff alleging disparate treatment cannot succeed unless the employee's age *'actually played a role in that process and had a determinative influence on the outcome.'" Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (emphasis added) (citation omitted).

Applying *Desert Palace* to the ADEA would create an opportunity for plaintiffs to turn every age discrimination claim into a mixed-motive case, thus imposing on employers a meaningful and substantial hardship. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer would determine the employer's burden of proof. Rather, plaintiffs could simply plead every garden variety discrimination claim under both a

single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent. Because damages for violations of the ADEA are limited to make-whole relief and liquidated damages for willful violations, there is no disincentive — as there might be under Title VII — to pursuing an age discrimination case under a mixed-motive theory.

ARGUMENT

I. REGARDLESS OF THE CIRCUMSTANCES, SHIFTING THE BURDEN OF PROOF TO THE EMPLOYER ON THE QUESTION OF CAUSATION IN AN INTENTIONAL AGE DISCRIMINATION CASE IS IMPROPER

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, makes it unlawful for an employer to, *inter alia,* "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). This provision is very similar to that contained in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which prohibits an employer from discriminating against an employee or applicant "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)

Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), developed "a sensible, orderly way to evaluate

the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The *McDonnell Douglas* burden-shifting scheme is one of the ways in which plaintiffs have been able to establish intentional discrimination using circumstantial evidence.

In order to make out a prima facie case under *McDonnell Douglas*, a plaintiff must show that (1) he was a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applications; (3) despite his qualifications, was rejected; and (4) after his rejection, the position remained open, and the employer continued to seek applicants with his qualifications. 411 U.S. at 802 (footnote omitted). The burden to establish a prima facie case is not onerous, yet it "creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Once that threshold requirement is met, the burden of production of evidence shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 802. If the employer succeeds, the presumption of discrimination drops from the case. *Burdine*, 450 U.S. at 255 n.10. At that point, the burden shifts back to the plaintiff to show the proffered reason was merely a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993). If the plaintiff cannot make this showing, he cannot establish a violation. *McDonnell Douglas*, 411 U.S. at 807.

In *Price Waterhouse v. Hopkins*, a Title VII case, a plurality of this Court ruled that where a plaintiff

proves that gender, along with other legitimate factors, played "a motivating part" in an employment decision, the plaintiff has shown that the decision was "because of" sex in violation of Title VII. 490 U.S. at 250. Under those circumstances, the employer can avoid liability only if it proves, by a preponderance of the evidence, that it would have made the same decision without considering the protected characteristic. *Id.* at 249. This method of proof has come to be referred to as the "mixed-motive" analysis. *Id.* at 246.

Under the *McDonnell Douglas* test, the plaintiff retains at all times the burden of persuading the fact finder that intentional discrimination occurred. *Burdine*, 450 U.S. at 253. By contrast, the mixed-motive analysis recognizes the relatively rare circumstance in which there actually exists direct, "smoking gun" evidence of discrimination, yet the employer contends that it would have taken the same employment action in any event. *Price Waterhouse*, 490 U.S. at 247. Once the plaintiff persuades the trier of fact that an illegitimate factor actually was considered, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246. The plurality characterized the employer's burden at this stage as "an affirmative defense." *Id.* It expressly declined to identify, however, "which specific facts, 'standing alone' would or would not establish a plaintiff's case," explaining that to do so was "unnecessary in this case." *Id.* at 252.

Justices White and O'Connor each wrote a separate opinion concurring in the judgment without joining the plurality opinion. Justice White disagreed with the plurality's requirement that the employer must

provide objective evidence that it would have reached the same result absent the discriminatory factor. In his view, employers should not be restricted to objective evidence to make this showing. *Id.* at 261 (White, J., concurring).

Justice O'Connor wrote separately to explain her view on "when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262 (O'Connor, J., concurring). In Justice O'Connor's view, only "*direct evidence* that an illegitimate criterion was a substantial factor in the decision" would justify shifting the burden of proof to the defendant under a mixed-motive analysis. *Id.* at 276 (O'Connor, J., concurring) (emphasis added). The defendant then would be required to show that it would have reached the same decision based on wholly legitimate reasons, without considering the protected characteristic. If the defendant succeeds, Justice O'Connor agreed with the plurality that it would not be considered to have discriminated "because of" a protected characteristic.

According to Justice O'Connor, mixed-motive cases appropriately require the employer to assume the heightened burden of refuting discrimination. While the prima facie case under *McDonnell Douglas* may give rise to an inference of discrimination, it does not amount to proof of "the evil[] Congress sought to eradicate from the employment setting." *Id.* at 275 (O'Connor, J., concurring). Therefore, the defendant is entitled to a presumption that it acted in good faith when confronted with only circumstantial evidence of discrimination, and should not have to prove that it acted lawfully. *See id.* at 266 (O'Connor, J., concurring). The existence of direct evidence of discrimina-

tion does not entitle the employer, however, to the same presumption that it acted in good faith. *Id.* at 271 (O'Connor, J., concurring).

A. Section 107 of the 1991 Civil Rights Act Did Not Amend the ADEA To Include a "Motivating Factor" Mixed-Motive Test

In enacting § 107 of the Civil Rights Act of 1991 (CRA), P.L. 102-166, Congress sought to partially overrule *Price Waterhouse* by creating and codifying a "motivating factor" test applicable to mixed-motive cases brought under Title VII. Specifically, § 107(a) amended Title VII to provide:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Section 107(b) continues:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court may grant declaratory relief, injunctive relief, and attorney's fees . . . and shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . .

42 U.S.C. § 2000e-5(g)(2)(B).

It is well-settled that when construing statutory provisions, courts must look first to the plain mean-

ing of the statutory language. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

On its face, § 107 applies only to cases of discrimination on the basis of race, color, religion, sex or national origin; it does not extend to causes of action for discrimination based on age or any other characteristic elsewhere statutorily protected. Congress thus consciously and conspicuously chose not to apply the "motivating factor" burden-shifting analysis applicable to Title VII mixed-motive cases to any other federal employment nondiscrimination law, including the ADEA.

If the plain text of § 107 were not enough, the legislative history of the CRA confirms that the motivating factor amendment was intended to apply only to Title VII. Preliminary versions of the bill contained a "Rules of Construction" provision that provided:

> In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights and Women's Equity in

> Employment Act of 1991 *as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by such act.*"

H.R. Rep. No. 102-40, pt. 1, at 12 (1991) (emphasis added). That language was dropped and never became part of the final bill.

In a section-by-section analysis of what *was* to become the 1991 CRA, Senator Dole described § 107 as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).[2] Because § 107 clearly does

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[2] *Amicus* AARP argues that the legislative history of the 1991 amendments actually supports extending *Desert Palace* to the ADEA, yet the statement it offers in its brief in support is incomplete, and taken out of context. That portion of the legislative history provides, in its entirety:

> RELATIONSHIP TO OTHER LAWS MODELED AFTER TITLE VII
>
> A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et. seq., are modeled after, and have been interpreted in a manner consistent with, Title VII.
>
> The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA, once a plaintiff makes a prima facie case of

not apply to claims brought under statutes other than Title VII, it cannot be used as a basis for shifting the burden of proof regarding causation to the employer.

B. *Desert Palace* Has No Applicability Beyond the Title VII Context

This Court recognized the limited scope of the 1991 amendments in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a Title VII case. Writing for the unanimous Court, Justice Thomas observed, "[t]his case provides us with the first opportunity to consider the effects of the 1991 Act on jury instructions in mixed-motive cases." *Id.* at 98. There, the Court held that "direct evidence of discrimination is not required in mixed-motive cases" brought under Title VII, *id.* at 101, and a plaintiff may use competent evidence of any sort, whether direct or circumstantial, to demonstrate that race, color, national origin, religion, or sex was a motivating factor in an employment decision. The Court rested its holding in large part on the

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disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. This was the clear intent of the Committee during its consideration of the ADA.

Similarly, mixed-motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.

H.R. Rep. No. 102-40, pt. 2, at 4 (1991). To the extent that the ADA specifically incorporates Title VII's remedies and procedures, there may be some strength to this statement as it may be applied to mixed-motive claims brought under the ADA. Significantly, the ADEA is not mentioned in the mixed-motive discussion above, however, and contains a remedial scheme that is patterned after the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, not Title VII.

actual text of Title VII, as amended by the CRA, which codified the "motivating factor" test in mixed-motive cases brought under that statute. The Court took note of the fact that the CRA did not extend the test to any other context outside of Title VII, and expressly declined to reach the question whether direct evidence of discrimination is required in mixed-motive causes of action brought under statutes other than Title VII.

"No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880). Because neither § 107 nor *Desert Palace* established a "motivating factor" test with respect to mixed-motive discrimination claims brought under the ADEA, neither can be used to justify shifting the burden of proof regarding causation to employers in such cases.

Despite sharing a common goal of eradicating employment discrimination, Title VII and the ADEA differ in a number of significant ways, further making § 107 and this Court's interpretation of it in *Desert Palace* plainly inapplicable to age discrimination claims. Unlike sex, race, and other protected characteristics, for instance, age often is correlated with legitimate factors, such as salary or seniority. There is a distinction between age-based decisions, which are unlawful, and actions based on age-correlated factors, which are not unlawful. It is much more difficult to devise a situation in which a "race-correlated" factor (if, in fact, such a thing exists) would not be a proxy for unlawful race discrimination. Furthermore, as this Court observed in *City of Jackson*, "[I]ntentional discrimination on the basis of

age has not occurred at the same levels as discrimination against those protected by Title VII." *Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005). Thus, while it is true that Title VII and the ADEA are alike in many ways, there also are significant differences, which as this Court has found, justify applying them differently in certain circumstances. Permitting a mixed-motive jury instruction in the absence of direct evidence of discrimination "because of" age is one such circumstance.

II. EVEN IF THE *PRICE WATERHOUSE* MIXED-MOTIVE ANALYSIS IS AVAILABLE UNDER THE ADEA, IN THE ABSENCE OF DIRECT EVIDENCE THAT A DEFENDANT TOOK ADVERSE EMPLOYMENT ACTION "BECAUSE OF" THE PLAINTIFF'S AGE, THE ULTIMATE BURDEN OF PROVING A VIOLATION OF THE LAW SHOULD REMAIN AT ALL TIMES WITH THE PLAINTIFF

This Court has never expressly applied *Price Waterhouse* to the ADEA context, and Congress has never endorsed a mixed-motive approach with respect to age discrimination claims. For that reason, the mixed-motive burden-shifting scheme applicable to Title VII cases arguably does not extend to claims brought under any other statute, including the ADEA, at all. Even if *Price Waterhouse* does apply to ADEA claims, however, the ultimate burden of proving unlawful discrimination nevertheless should always remain squarely with the plaintiff, unless and until direct evidence is presented demonstrating that the employer took the challenged employment action "because of" the plaintiff's age. "In the employment context, direct evidence of discrimination is 'evidence

of conduct or statements that both reflect directly on the alleged discriminatory attitude and that bear directly on the contested employment decision.'" *Johnson v. Mechanics & Farmers Bank*, 2009 U.S. App. LEXIS 1260 (4th Cir. Jan. 23, 2009) (citation omitted).

This Court has said that where there is no clear majority opinion, "the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). Justice O'Connor's concurring opinion in *Price Waterhouse* requiring direct evidence as a prerequisite for shifting the burden of proof to the employer is the narrowest ground on which a majority of the Justices agreed and thus states the holding of the Court. In fact, Justice Kennedy's dissent, which the Chief Justice and Justice Scalia joined, specifically describes the Court's holding by referring to Justice O'Connor's "direct evidence" standard: "The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision." 490 U.S. at 280 (Kennedy, J., dissenting).

The employee in *Price Waterhouse* produced compelling and persuasive evidence that her employer improperly relied on gender stereotypes in deciding to pass her over for partnership. The evidence included specific statements by firm decision makers, including the suggestions that the plaintiff could increase considerably her chances of partnership if she were to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" 490 U.S. at 272 (O'Connor, J., concurring) (citation omitted).

To Justice O'Connor, such statements displayed an obvious sex bias just as clearly as if "she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid." *Id.* at 273 (O'Connor, J., concurring). The overt "advice" that the plaintiff should act more like a woman to improve her partnership prospects thus directly connected her sex to the adverse employment action, warranting the "strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation . . . ." *Id.* at 262.

Importantly, Justice O'Connor noted that mere stray remarks, statements made by non-decision makers, statements made by decision makers that are unrelated to the challenged employment decision, or only indirect evidence of sex stereotyping are insufficient to warrant a mixed-motive instruction. *Id.* at 277 (O'Connor, J., concurring). Otherwise, any passing reference to a protected characteristic could be used to convert a pretext case to one involving direct evidence, thereby justifying placing the burden on the employer to prove that it did not discriminate. As Justice O'Connor wisely observed:

> Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of sex."

Id. (O'Connor, J., concurring).

This is particularly dangerous ground under the ADEA, where many legitimate employment actions may *correlate* with age without being made "because of" it. In *Mereish v. Walker*, the Fourth Circuit pointed out:

> [W]hen Congress enacted the Civil Rights Act of 1991 in response to *Price Waterhouse*, it amended only Title VII and did not pass a corresponding amendment to the ADEA. And maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions.

359 F.3d 330, 339-40 (4th Cir. 2004). Thus, as this Court observed last Term, "'[w]hatever the employer's decisionmaking process,' a plaintiff alleging disparate treatment cannot succeed unless the employee's age 'actually played a role in that process and had a determinative influence on the outcome.'" *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (citation omitted).

III. APPLYING *DESERT PALACE* TO THE ADEA WOULD CREATE AN OPPORTUNITY FOR PLAINTIFFS TO TURN EVERY AGE DISCRIMINATION CLAIM INTO A MIXED-MOTIVE CASE, THUS IMPOSING ON EMPLOYERS A MEANINGFUL AND SUBSTANTIAL HARDSHIP

Replacing the conventional *McDonnell Douglas* burden-shifting approach with the markedly less burdensome "motivating factor" approach in mixed-motive ADEA cases involving only circumstantial

evidence would fundamentally alter the manner in which such cases are litigated. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer would determine the employer's burden of proof.

Instead, opportunistic plaintiff's counsel eager to win their cases — or negotiate generous settlement packages with "deep-pocketed" corporate defendants — will plead every garden variety discrimination claim under both a single-motive and a mixed-motive theory, so as to benefit from not having to bear the ultimate burden of proof in cases in which their pretext evidence is weak or nonexistent. Because damages for violations of the ADEA are limited to make-whole relief and liquidated damages for willful violations, there is no *disincentive* — as there might be under Title VII — to pursuing an age discrimination case under a mixed-motive theory. Employers rightly concerned about the difficulties associated with proving, by a preponderance of the evidence, a *negative* — that they *did not* discriminate — invariably will consider more carefully any opportunity to settle early, even where they believe they have been wrongly accused.

The prospect of turning every employment discrimination claim into a mixed-motives case is especially problematic because employment decisions often provide fertile grounds for discrimination claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic was *a* motivating factor, as opposed to *the* motivation. As one commentator observed:

> Employment decisions . . . are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor—a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. . . . Summary judgment will be less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). Permitting plaintiffs to manipulate the burdens of proof in age discrimination cases in this manner increases significantly their chances of avoiding summary judgment, and ultimately prevailing at trial, even where their evidence is very weak.

Furthermore, frivolous mixed-motives claims divert attention and resources away from the development of proactive corporate anti-discrimination measures. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997).

To guard against this waste, this Court properly restricted the mixed-motives analysis to the rare case in which a plaintiff can demonstrate with a high degree of assurance that the challenged employment

decision was the result of illegitimate motives. *Price Waterhouse*, 490 U.S. at 247. This standard should ensure that "plaintiffs in employment discrimination cases use anti-discrimination laws only as a shield against overly illegal employer conduct, and not as a sword to threaten employers into wasteful prophylactic actions." *Ward*, *supra* at 663 (footnote omitted).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; ASIAN AMERICAN JUSTICE CENTER; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case?

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Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 Lab. Law. 371 (1997) 19

Hon. Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503 (2008) 15

Michael Zubrensky, *Despite the Smoke There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 Stan. L. Rev. 959 (1994) 19

STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Petitioner's argument that a plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII case.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of

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[1] The parties have consented to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief.

Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC and its Affiliates have a long-standing interest in addressing matters of employment discrimination that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

The Mexican American Legal Defense and Education Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. MALDEF's mission includes a commitment to ensure equal employment opportunities for Latinos in the United States.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from all forms of discrimination.

This case, involving the types of evidence an employee may be required to offer to obtain a mixed-motive jury instruction, is a matter of significant concern to all *amici* and those they serve. *Amici* have consistently fought against imposing an artificial direct evidence requirement both in litigation and through legislative efforts, including the passage of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), held that Title VII does not require direct evidence in mixed-motive cases. *Amici* believe the same standard should be applied to similar anti-discrimination statutes, and therefore respectfully request this Court to extend that rule to non-Title VII cases, including the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a).

SUMMARY OF ARGUMENT

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) the Court rejected the distinction between direct and other types of evidence in the context of Title VII mixed-motive claims. Applying the reasoning of

Desert Palace, the Court should also reject this distinction for ADEA mixed-motive claims.

Following *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) courts struggled to develop a uniform application of what some courts believed was a direct evidence requirement. Part of the uncertainty resulted from disagreement about whether Justice O'Connor's concurrence in *Price Waterhouse* was the holding of the Court. This opinion required employees to present direct evidence to obtain a mixed-motive instruction. However, on the issue of whether direct evidence is required, Justice O'Connor's concurrence in *Price Waterhouse* is not the narrowest grounds of agreement by the Court, and therefore it is not controlling.

In practical application, a direct evidence requirement proved to be unworkable, dragging courts into unproductive and time-consuming attempts to draw indecipherable lines between what does and does not constitute direct evidence. This has led to confusion and inconsistency, both between and within the circuit courts. Nothing in the text or purpose of the ADEA suggests that the allocation of the burden of proof should turn on the type of evidence employees rely upon. Further, such a distinction does not serve a useful purpose, as circumstantial evidence may be as probative, or more probative, than direct evidence. In *Desert Palace*, the Court rejected this artificial distinction between direct and circumstantial evidence. The Court should reject the requirement under the ADEA for the same reasons the Court

rejected a direct evidence requirement under Title VII.

ARGUMENT

Employees in non-Title VII cases should not be required to present direct evidence in order to obtain a mixed-motive instruction. If an employee establishes that an unlawful purpose was a motivating factor – regardless of whether this is established by direct or circumstantial evidence – the employer should bear the burden of proving that it would have made the same decision in the absence of discrimination.

I. *Price Waterhouse* Does Not Require An Employee To Have "Direct" Evidence To Shift The Burden Of Persuasion To The Employer.

A. Justice O'Connor's Requirement Of "Direct" Evidence In *Price Waterhouse* Is Not The Holding Of The Case.

The type of evidence required to obtain a mixed-motive instruction in a discrimination case has been a subject of continuing dispute in the lower courts.[2] This confusion stems from the Court's divided ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[2] *See* discussion *infra* in Part III.

In *Price Waterhouse*, four justices joined Justice Brennan's plurality opinion, stating that burden shifting occurred when the plaintiff proved that a discriminatory intent played a "motivating part" in the disputed action. *Id.* at 258. Justice O'Connor's concurring opinion alone required that this showing be based on "direct" evidence. *Id.* at 276 (O'Connor, J., concurring).

Following this ruling, lower courts split on whether Justice O'Connor's requirement of direct evidence was necessary to shift the burden of proof to the employer. However, Justice White's concurrence is the narrowest ground of agreement and therefore it controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when no rationale receives five votes, the holding of the Court is the position taken by those who concurred in the judgment on the narrowest grounds).

Writing for a plurality of four in *Price Waterhouse*, Justice Brennan relied upon *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), as the basis for the burden shifting framework. *Price Waterhouse*, 490 U.S. at 247-50, 254, 257. In his concurrence, Justice White largely agreed with the plurality's approach. He concurred with the plurality's reliance on *Mt. Healthy* as the source for the framework the Court was adopting in *Price Waterhouse*. *Id.* at 258-60. Justice White articulated that *Mt. Healthy* provided the exact framework for analyzing Title VII cases and required an employee to

show that unlawful bias was "a substantial factor," not just "a motivating factor," in the employer's action, to shift the burden of persuasion. *Price Waterhouse*, at 258-60.

Justice O'Connor's concurrence parted ways with the plurality more fundamentally than did Justice White's. Justice O'Connor concluded the words "because of" in Title VII meant "but-for" causation. *Id.* at 262-63.[3] Like Justice White, Justice O'Connor required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," to shift the burden of persuasion. Unlike Justice White, Justice O'Connor required the plaintiff to demonstrate this through "direct" evidence.[4] *Id.* at 276.

The Eighth Circuit contends that Justice O'Connor's opinion is the holding of the Court in *Price Waterhouse*, viewing it as the "narrowest" ground of decision. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 362 (8th Cir. 2008). This is clearly incorrect. *See Marks*, 430 U.S. at 193 (*quoting Gregg v. Georgia*, 428 U.S. 153 (1976)); *Nichols v. United States*, 511 U.S.

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[3] Justice White took no position on this question, as he considered the difference to be mere semantics, given that six Justices agreed the plaintiff recovered nothing if the defendant proved a same action defense. *Price Waterhouse*, 490 U.S. at 259.

[4] Indeed, what Justice O'Connor referred to as "direct" evidence is not consistent with the manner in which many lower courts have interpreted "direct" evidence, to require evidence that directly proves the existence of a fact without requiring any inferences, as discussed below at Part III.

738, 743-47 (1994); *Waters v. Churchill*, 511 U.S. 661, 685-86 (1994) (Souter, J., concurring) (explaining how to apply *Marks* where five Justices agree on some, but not all, aspects of the plurality opinion).[5]

In *Price Waterhouse*, five Justices (Blackmun, Brennan, Marshall, Stevens, and White) agreed that there was no requirement for a plaintiff to introduce direct evidence to shift the burden to the defendant. Justice White's strict adherence to *Mt. Healthy*, which does not require a plaintiff to have direct evidence to shift the burden,[6] leaves no doubt where he stood on

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[5] Although the Eighth Circuit has treated Justice O'Connor's opinion as controlling, the Court, in *Desert Palace*, acknowledged that the question of which opinion from *Price Waterhouse* was controlling was an open question, one that it was not necessary to address to decide that case. *Desert Palace*, 539 U.S. at 93, 97-98.

[6] Nine of the ten circuits to have considered the question have held that *Mt. Healthy* does not have a direct evidence requirement: *Lewis v. City of Boston*, 321 F.3d 207, 219 (1st Cir. 2003); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990); *Gonzales v. Dallas County*, 249 F.3d 406, 412 n.6 (5th Cir. 2001); *Sowards v. Loudon County*, 203 F.3d 426, 431 n.1 (6th Cir. 2000); *Pugh v. City of Attica*, 259 F.3d 619, 629 (7th Cir. 2001); *Allen v. Iranon*, 283 F.3d 1070, 1074-75 (9th Cir. 2002); *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001); *Spanier v. Morrison's Mgmt. Servs. Inc.*, 822 F.2d 975, 979-80 (11th Cir. 1987). The Eighth Circuit is internally inconsistent in whether to require direct evidence under *Mt. Healthy*. *Compare Davison v. City of Minneapolis*, 490 F.3d 648, 655 n.5 (8th Cir. 2007) (noting the inconsistent usage and allowing circumstantial evidence to be used in a First Amendment case) *with Graning v. Sherburne County*, 172 F.3d

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this question. Only four Justices in *Price Waterhouse* – Justice O'Connor and the three dissenters – concluded that a Title VII plaintiff must have direct evidence to shift the burden of persuasion. Therefore, the holding of *Price Waterhouse*, properly construed, is that plaintiffs can prove their case by direct or circumstantial evidence.

This holding is consistent with Court precedent allowing circumstantial evidence in mixed-motive non-Title VII cases. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (using both "circumstantial and direct evidence" in an equal protection case involving race discrimination); *Hunter v. Underwood*, 471 U.S. 222 (1985) (same). This result is the same even after *Price Waterhouse*. *See Bd. of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996) (applying the *Mt. Healthy* framework in a First Amendment claim).

B. *Desert Palace* Provides Important Guidance.

Desert Palace is the Court's most recent statement on this question; it deserves significant attention in determining whether or not direct evidence is

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611, 615 n.3 (8th Cir. 1999) (defining the Eighth Circuit's "direct evidence" requirement in mixed-motive claims under the *Mt. Healthy* framework as "evidence that directly reflects the use of an illegitimate criterion in the challenged decision") (citation omitted).

required for a mixed-motive instruction in non-Title VII cases. While the Eighth Circuit correctly notes that the Supreme Court "declined to address which opinion in *Price Waterhouse* was controlling," the Eighth Circuit then mistakenly asserts that Justice O'Connor's concurrence should continue to be controlling where applicable. *Gross*, 526 F.3d at 362.

The Eighth Circuit suggests that the ruling in *Desert Palace* turned on the addition of 42 U.S.C. § 2000e-2(m) to Title VII, and thus that *Desert Palace* has no bearing on interpretation of the ADEA. *Gross*, 526 F.3d at 362. This is incorrect. Neither § 2(m) nor any other part of the Civil Rights Act of 1991 makes any reference to the direct evidence standard of *Price Waterhouse*. The substantive changes made by § 2(m) and 42 U.S.C. § 2000e-5(g)(2)(B) were to confirm that an unlawful practice was established when a plaintiff demonstrated that a protected characteristic was a motivating factor for an employment practice, and that the employer had a limited affirmative defense in such circumstances which did not absolve it of liability. This changed the *Price Waterhouse* rule which had permitted employers a complete defense, rather than merely limiting the relief available. *Compare Price Waterhouse*, 490 U.S. at 245-46 *with* § 2000e-5(g)(2)(B).

Indeed, the legislative history of the 1991 Civil Rights Act makes clear that Congress did not read *Price Waterhouse* to establish any sort of a direct evidence requirement, and thus had no need to take any action to eliminate such a requirement. The

legislative history demonstrates that Congress considered there to be the three significant holdings of *Price Waterhouse*: (1) sex-stereotyping evidence is sufficient to prove gender discrimination; (2) the defendant need not prove a "same action defense" by clear and convincing evidence; and (3) where such a defense is proved, the plaintiff receives no relief. H.R. Rep. No. 102-40(I), pt. 1, at 45 & n.39 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 583. Conspicuously absent is any mention of a direct evidence holding, indicating that Congress did not believe *Price Waterhouse* required the plaintiff to produce direct evidence of discrimination. Thus, the particular changes made by the Civil Rights Act of 1991 cannot be the basis for this Court's ruling in *Desert Palace* that direct evidence was not required.

These statutory changes to Title VII were completely silent as to the evidentiary standard for establishing a "motivating factor." Significantly, the Court in *Desert Palace* noted that silence as to any heightened evidentiary standard weighed in favor of finding that no such standard applied. *Desert Palace*, 539 U.S. at 99. The ADEA is equally silent on the evidentiary standard, and thus *Desert Palace* provides useful guidance on this issue.

II. *Desert Palace* Rejected A Requirement Of Direct Evidence To Shift The Burden Of Proof In Mixed-Motive Cases.

A. Neither Congress Nor The Supreme Court Distinguishes Between Direct And Circumstantial Evidence For The Purpose Of Proving Violations Of Discrimination Laws.

The Court's opinion in *Desert Palace* recognized that Congress is explicit when it wants to impose a higher standard of evidence for establishing a claim. *Desert Palace*, 539 U.S. at 99. Commenting on the absence of statutory text requiring a more rigorous standard, Justice Thomas observed that

> [s]ilence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases."

Desert Palace, 539 U.S. at 99 (*citing Price Waterhouse*, 490 U.S. at 253 (plurality opinion) and *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)). Similarly, the ADEA specifies no heightened evidentiary standard for proof of intentional discrimination in a mixed-motive case.

The citations in *Desert Palace* to Justice Brennan's plurality opinion in *Price Waterhouse* and to *Aikens*, reaffirms that "the plaintiff may prove his case by direct or circumstantial evidence" and that the "trier of fact should consider all the evidence,

giving it whatever weight and credence it deserves." *Aikens*, 460 U.S. at 714 n.3.[7] This language from *Desert Palace* also indicates that Justice O'Connor's view in *Price Waterhouse* – that direct evidence is required for the burden to shift in a mixed-motive case – does not control.

Recognizing that the distinction between direct and other types of evidence is sometimes indecipherable, the Court in *Desert Palace* discussed the value, historical acceptance, and the practical necessity of using circumstantial evidence in employment discrimination cases as well as in other types of civil and criminal cases. To illustrate the utility of circumstantial evidence, the Court cited *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), an ADEA case that permitted a jury to base a finding of intentional discrimination, in part, on inferences that the employer's stated reason for discharge was false. *Desert Palace*, 539 U.S. at 100.

The Court's citation to *Reeves* is instructive. If circumstantial evidence can be used to determine the ultimate issue, namely "whether the employer intentionally discriminated," there is no reason to adopt a rule that direct evidence must be presented to shift the burden of proof in a mixed-motive case. *Reeves*, 530 U.S. at 146.

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[7] *Aikens* emphasized that "trial courts or reviewing courts should [not] treat discrimination differently from other ultimate questions of fact." *Aikens*, 460 U.S. at 716.

The importance of adhering to "conventional rule[s] of civil litigation" applies with equal weight in light of the ADEA's statutory silence on any heightened evidence standard in mixed-motive cases. *See, e.g.*, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992) (stating that a direct evidence requirement "runs afoul of more general evidentiary principles") (*quoting Price Waterhouse*, 490 U.S. at 253). *Desert Palace* rejects the distinction drawn by the lower court here between direct and circumstantial evidence. This Court should again reject this artificial distinction under the ADEA.

B. *Desert Palace* Acknowledges That Circumstantial Evidence Can Be As Probative As Direct Evidence.

The Court in *Desert Palace* emphasized the value of both direct and circumstantial evidence. "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace*, 539 U.S. at 100 (*quoting Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

> [The Court] ha[s] often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), [the Court] recognized that evidence that a defendant's explanation for an

> employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination."

Desert Palace, 539 U.S. at 99-100 (*quoting Reeves*, 530 U.S. at 147). If, as *Desert Palace* posits, circumstantial evidence is sometimes better suited than direct evidence to provide the most thorough account of the truth, a "direct evidence-only" rule can only operate to hamper courts in search of that truth. This is especially true when "the direct evidence of a positive eyewitness can be quite undone by contradictory circumstantial evidence."[8]

C. The ADEA Contains No Heightened Evidentiary Standards For Mixed-Motive Cases.

The Court routinely interprets similar statutory language of Title VII and the ADEA in a comparable manner. *See, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 233-34 (2005) ("We have consistently applied that presumption to language in the ADEA that was derived *in haec verba* from Title VII.") (citation

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[8] Hon. Timothy M. Tymkovich, *The Problem with Pretext*, 85 Denv. U. L. Rev. 503, 521-22 (2008) (addressing the "problem with the direct and indirect evidence dichotomy" under the *McDonnell Douglas* framework).

omitted). Circuit courts have also applied similar statutory principles when analyzing the ADEA.[9]

Given its analysis of Title VII in *Desert Palace*, the Court provides the framework to examine the ADEA's silence regarding a heightened evidence standard. In *Desert Palace*, the Court noted that, "[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." 539 U.S. at 99. The Court recognized that Congress is unequivocal when it intends to require a certain type of evidence. *Cf. id.* at 99 (listing situations where Congress explicitly requires a "clear and convincing evidence" standard). A lower court, applying the Court's reasoning in *Desert Palace*, has held that direct evidence of discrimination is not required to shift the burden of proof in an ADEA mixed-motives case.[10] It is appropriate for the Court to extend *Desert Palace* to the ADEA.

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[9] *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 698 (3d Cir. 1995) (noting that because the prohibition against age discrimination contained in the ADEA is similar in text, tone, and purpose to the prohibition against discrimination contained in Title VII, courts routinely look to law developed under Title VII to guide an inquiry under the ADEA); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1164 (8th Cir. 1985) (applying Title VII evidentiary burdens to the ADEA, because the ADEA grows out of Title VII and much of the language of the ADEA parallels that of Title VII).

[10] *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (footnotes omitted) ("Given that the language of the relevant provision of the ADEA is similarly silent as to the heightened direct evidence standard, and the presence of

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III. A Direct Evidence Requirement Creates An Impractical And Unworkable Rule For Courts To Apply.

Justice O'Connor's use of "direct" evidence has produced inconsistent standards in the circuit courts. Justice O'Connor stated that to obtain a mixed-motive instruction in a Title VII case, the plaintiff must provide "direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring). However, Justice O'Connor provided courts with little guidance as to the meaning of the direct evidence requirement other than offering that it is not "stray remarks in the workplace," "statements by nondecisionmakers," or "statements by decisionmakers unrelated to the decisional process itself." *Price Waterhouse*, 490 U.S. at 277.

Indeed, the evidence Justice O'Connor deemed "direct" evidence in *Price Waterhouse*, does not constitute direct evidence as formally defined. *Price Waterhouse*, 490 U.S. at 277. Black's Law Dictionary defines "direct evidence" as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 596 (8th ed. 2004). In *Price Waterhouse*, the plaintiff did not put forth evidence

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heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed-motives analysis for an ADEA claim.").

meeting this definition. As the United States Court of Appeals for the District of Columbia observed:

> The decisionmakers who denied Ann Hopkins a partnership never admitted or stated expressly that the action was based on her gender. Rather, the Court cites gender-related, stereotyping evaluations and comments made by some partners as suggesting to the factfinder that gender played a role in the denial.

Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997) (citations omitted).

By accepting such evidence as "direct" evidence, "Justice O'Connor relie[d] on circumstantial evidence . . . to show that the employer's discriminatory motive played a substantial role in the disputed employment decision." *Id.* In doing so, Justice O'Connor made a causal inference – which a strict definition of direct evidence would prohibit.

In his dissent in *Price Waterhouse*, Justice Kennedy predicted that under the burden shifting framework Justice O'Connor proposed: "[t]rial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift" and "to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." *Price Waterhouse*, 490 U.S. at 291. This prediction proved to be accurate. Courts have been mired in a hopeless and unproductive endeavor to distinguish between direct and

circumstantial evidence. Courts and commentators have written volumes attempting to define direct evidence and have arrived at a variety of conflicting definitions.[11]

The Second Circuit has observed, "the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992). Other circuit courts have also recognized the difficulty in determining what constitutes direct evidence. *See Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 (1st Cir. 2000) ("[i]t is often quite difficult to draw the line between what is 'direct evidence' and what is 'circumstantial evidence'") (*citing Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582-83 (1st Cir. 1999); *Bartlik v. Dep't of Labor*, 73 F.3d 100, 103 n.5 (6th Cir. 1996) (noting "[t]he distinction between direct and circumstantial evidence in employment discrimination cases is not self-evident").

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[11] *See* Michael Zubrensky, *Despite the Smoke There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 Stan. L. Rev. 959, 970-80 (1994); Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 Stan. J. Civ. Rts. & Civ. Liberties 1, 25-27 (2005); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 Lab. Law. 371 (1997); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995).

The difficulty circuit courts have had in developing a direct evidence standard since *Price Waterhouse* is illustrated by the divergent approaches the courts have adopted. At least three distinct approaches have emerged. Under one definition of direct evidence – what has been termed the classical approach – evidence is only viewed as direct evidence where it "proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings*, 188 F.3d 1204, 1207 (10th Cir. 1999). Under this standard, the statement "[f]ucking women, I hate having fucking women in the office" by a supervisor in the context of a performance problem related to the plaintiff was found not to constitute direct evidence, and therefore insufficient to shift the burden to the employer. *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993).

A more lenient standard adopted by several other circuits allows limited inferences to be made by the trier of fact. Under this standard "'direct evidence' means evidence sufficient to allow the jury to find that 'the decision makers placed substantial negative reliance on [the plaintiff's age] in reaching their decision.'" *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002) (citation omitted). Using this standard the Third Circuit found the statement made by a non-decision maker that he wanted to "fire [the plaintiff] and replace her with an exceptionally endowed, younger woman . . . fraught with permissible inferences that he desired to fire [the plaintiff] at least in

part because of her age." *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 513-14 (3d Cir. 2004).

A third standard defines direct evidence in a manner that expressly includes circumstantial evidence. Courts using this standard have interpreted direct evidence as consisting of "'any sufficiently probative direct or indirect evidence' that unlawful discrimination was a substantial factor in the employment decision." *Thomas*, 131 F.3d at 204 (*quoting White v. Federal Express Corp.*, 939 F.2d 157, 160 (4th Cir. 1991). Indeed, courts have classified statements unconnected to the contested employment action as direct evidence and inferred discriminatory action from them.[12]

Returning to the comment which the Tenth Circuit in *Heim* found not to constitute direct evidence, illustrates the confusion and inconsistency that is created by a direct evidence requirement. Under the standards adopted in the Third Circuit it is not clear whether or not this would constitute direct evidence for burden shifting purposes. There is no doubt however that the parties would spend considerable judicial time and resources arguing these imprecise distinctions in trying to categorize this piece of evidence. Under the third standard

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[12] *See Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 174 (2d Cir. 1992) (holding statements that older people "should have retired years ago" and "should have stayed retired" constitute direct evidence).

adopted by some courts it would appear that this evidence would constitute direct evidence.

Regardless of which model is used, requiring direct evidence for the ADEA will also complicate the analysis for claims based upon more than one protected class. For example, suppose that a supervisor made the statement, "I really have had problems with old black folks like you but I don't think you are qualified anyhow."[13] In light of *Desert Palace*, the court does not need to decide whether this constitutes direct evidence in the context of Title VII. Rather the court will look at all the evidence, regardless of how it is categorized in deciding whether a mixed-motive instruction is proper. If, however, the ADEA is interpreted to require direct evidence, the court will first have to try to "make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." *Price Waterhouse*, 490 U.S. at 291. If the court finds the statement not to be direct evidence it would lead to inconsistent application of anti-discrimination laws. The statement above may receive a mixed-motive instruction in the Title VII claim but not on the ADEA claim.

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[13] While this is posed as a hypothetical, these types of claims exist. *Cf. Burton v. Town of Littleton*, 426 F.3d 9, 13 (1st Cir. 2005) (plaintiff alleged that employer "call[ed] her an 'old Jew bitch'" during a phone conversation – the claim was ultimately dismissed based on insufficient evidence).

IV. A Direct Evidence Requirement Undermines The Congressional Goals Of The Anti-Discrimination Laws.

In passing civil rights legislation, Congress's goal has been to eliminate all forms of discrimination in the workplace. With the Civil Rights Act of 1991, Congress reiterated that "[i]t is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest." H.R. Rep. No. 102-40(I), at 46-47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584-85. With this and other civil rights legislation, Congress has been unequivocal about its intent to eliminate discrimination in the workplace. The ADEA is one of these statutes. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (referring to the ADEA as a "national employment policy").

In the employment context, the Court has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716 (1983). Moreover, "[b]ecause discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999). Requiring direct evidence imposes a heavy and arbitrary burden on employees seeking a mixed-motive jury instruction. Because direct evidence is extremely rare, most plaintiffs will be unable to obtain a mixed-motive instruction.

Similarly, in applying statutes that reflect an important national policy, like the ADEA,[14] courts should not "make their inquiry even more difficult by applying legal rules which were devised to govern 'the allocation of burdens and order of presentation of proof.'" *Aikens*, 460 U.S. at 716 (*citing Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)).

By imposing this often insurmountable burden on employees, a direct evidence requirement lessens the deterrent effect of employment discrimination statutes, by rendering them nearly inapplicable to many discriminatory decisions. Further, it would allow some employers to evade responsibility for their actions even though one of the protected classifications, here age, actually motivated the adverse employment action. Courts serve society best when they base their decisions on the strongest evidence regardless of whether that evidence is designated under various amorphous definitions as either direct or circumstantial.

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[14] *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995) (referring to the ADEA as a "national employment policy").

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Eighth Circuit should be REVERSED.

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AMICUS CURIAE BRIEF

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Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of practitioners who represent employees in labor, employ-

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

ment and civil rights disputes. NELA and its 68 state and local affiliates have a membership of over 3,000 lawyers nationwide working on behalf of clients with claims of unlawful treatment in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the Court in employment cases actually play out on the ground.

Of particular importance in this case, NELA is intimately familiar with the way in which lower courts deal with the approaches to proof of discrimination embodied in cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Unfortunately, the lower courts continue to reach results out of step with this Court's foundational rulings, with the effect of narrowing the methods of proof that employees may use to prove their claims. NELA is well positioned to suggest remedies for this problem.[2]

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[2] NELA has submitted *amicus curiae* briefs in many recent cases before the Court, including *Crawford v. Metropolitan Gov't of Nashville & Davidson County*, ___ S.Ct. ___ (Jan. 26, 2009); *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008); *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008); and *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008). NELA also filed an *amicus* brief in *Desert Palace*, as well as a brief at the petition stage in the present case, supporting petitioner's request for *certiorari*.

SUMMARY OF ARGUMENT

Flexibility is the hallmark of this Court's approach to proof in EEO cases. The Court's very first protocol for analyzing Title VII evidence, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), came with a warning: "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

The method set forth in *McDonnell Douglas*, and the many cases refining it, helps to sort out an unlawful motive from legal reasons for the same action. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), simply captured situations where sorting out the illegal motive was more difficult, because the employee's protected status blended with other reasons to motivate the adverse action. In those situations, the Court held, the burden shifted to the employer to disprove that the protected status was a factor. This was consistent with the familiar principle requiring the tortfeasor to shoulder the burden on causation, where it would be unreasonable to require the injured party to tease out the concurrent factors.

Price Waterhouse did not hold that there were two mutually exclusive means of proving an EEO claim—*McDonnell Douglas* and *Price Waterhouse*. Nevertheless, many lower courts, including the Eighth Circuit in this case, insist that proof be rigidly compartmentalized into two discrete categories. They have posited a dichotomy where none exists and hold that plaintiffs need direct evidence to avail themselves of *Price Waterhouse*. Only a few plaintiffs, though, can point to admissions or their

like, and all others are remitted to *McDonnell Douglas*.

In *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983), the Court alluded to the difficulty of obtaining direct evidence, noting that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." There is no warrant for requiring direct evidence in any aspect of EEO litigation, especially in light of "the basic standard of relevance" in federal courts, which the Court has recognized "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).

Part of this problem stems from imprecise terminology. Courts speak of *Price Waterhouse* as applying to "mixed motive" cases. But virtually all EEO cases involve a mixture of motives, including those properly analyzed under *McDonnell Douglas*. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The *number* of co-existing motives is not an accurate way to classify cases subject to *Price Waterhouse*.

More ominous, many courts--including the *en banc* Ninth Circuit whose judgment this Court affirmed in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)—see the converse of "mixed motive" as "sole motive." The result is to impose an unduly harsh burden on plaintiffs even in classic *McDonnell Douglas* cases.

Rather than continuing to use "mixed motive" as a term of art, it is more appropriate to adopt the language used by Congress and call these "same action" cases. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Unlike "mixed motive," "same action" highlights the salient feature that actually distinguishes *Price*

Waterhouse cases: the burden of proof shifts to the defendant to show that it would have made the same decision in a bias-free setting.

Regardless of terminology, direct evidence should not be permitted to provide a gate-keeping function for *Price Waterhouse*. Circumstantial proof – which may be "more certain, satisfying and persuasive than direct evidence," *Desert Palace*, 539 U.S. at 100 – is sufficient.

ARGUMENT

I. THE LOWER COURTS HAVE CREATED A FALSE DICHOTOMY BETWEEN *McDONNELL DOUGLAS* AND *PRICE WATERHOUSE*

The Age Discrimination in Employment Act (ADEA), like other civil rights statutes, does not limit a plaintiff to any particular method of proof, provided that the employee establishes workplace discrimination "because of such individual's age." 29 U.S.C. § 623(a)(1). This key language is not limited to a single theory of proof, as this Court recently reaffirmed. *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2403 (2008) (same statutory language also supports a disparate impact theory under the ADEA).

A generation ago, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Court blazed one trail for the Title VII plaintiff to make out a prima facie case:

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications,

he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications

The Court has continued over the decades to refine the order and allocation of proof under Title VII and the ADEA. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-12 (1993); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The method as set forth in these cases helps to sort out a discriminatory (or retaliatory) motive from other, possibly legal reasons for the same action. *See, e.g, Wilkie v. Robbins*, 127 S. Ct. 2588, 2601 (2007) ("we have established methods for identifying the presence of an illicit reason (in competition with others), not only in retaliation cases but on claims of discrimination based on race or other characteristics"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (*McDonnell Douglas*, as applied to ADEA, is meant to separate age from non-age-related factors in an adverse action).

Price Waterhouse was not meant to depart from this well-hewn line of cases, but to capture situations where sorting out the illegal motive was more difficult. *Price Waterhouse* itself was a particularly illustrative example of this phenomenon, since it involved a collective decision in which many actors had inputs—some of which were discriminatory—and it was difficult to discern which actors were heard

and to what effect. *See* 490 U.S. at 245-46 (plurality decision); *id.* at 260 (White, J., concurring in the judgment); *id.* at 278 (O'Connor, J., concurring in the judgment).

A majority of the Court held that where the employee's protected status blended with other reasons to motivate the adverse action, the burden shifted to the employer to disprove that the protected status was a factor. *Id.* at 241 (plurality decision) ("we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations"); *id.* at 260 (White, J. concurring in the judgment) (because "the District Court found that the employer was motivated by both legitimate and illegitimate factors," plaintiff "was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action"); *id.* at 273 (O'Connor, J., concurring in the judgment) (where different factors influenced the decision, "requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions").

Following *Price Waterhouse*, of course, Congress enacted particular rules for Title VII claims that recognize proof of a prohibited "motivating factor," as well as the relief available when the defendant proves the "same action" would have been taken anyway. *See* 42 U.S.C. §§ 2000e-2(m) and -5(g)(2)(B). *See, e.g., Desert Palace v. Costa*, 539 U.S. 90, 98-99 (2003).

The *Price Waterhouse* shift followed the familiar path of requiring the tortfeasor to carry some or all of the burden on causation, where it would be unreasonable to require the injured party (who often

lacks access to critical information) to comb out possible concurrent factors. This scheme is often followed in tort and statutory law. *See, e.g., de Bazan v. Secretary of Health and Human Services*, 539 F.3d 1347, 1352 (Fed. Cir. 2008) (under National Childhood Vaccine Injury Act, once petitioner proves that vaccine was cause-in-fact of injury, burden shifts to the government to prove by a preponderance of the evidence that the claimant's injury is due to factors unrelated to the administration of the vaccine); *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) (under § 1983, "[i]n a case of concurrent causation, the burden of proof shifts to the defendants in that 'a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the whole harm' because multiple tortfeasors are jointly and severally liable") (citation omitted); *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 407 (8th Cir. 2004) (under Iowa products-liability law, the "plaintiff still must show that one of the defendants caused his injury, but 'the burden of proof as to which actor caused the harm shifts to the defendants because there is uncertainty as to which of them caused the injury'") (citation omitted).

It was never supposed—in any opinion filed in *Price Waterhouse*—that there would henceforth be just two mutually exclusive means of proving any discrimination claim. The *McDonnell Douglas* protocol itself is flexible and was "'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002), *quoting Waters*, 438 U.S. at 577; *see also Aikens*, 460 U.S. at 715. This flexibility allows the court and parties to conform the proof to the distinct factual patterns unique to a particular case, because "[t]he facts necessarily will vary in Title VII cases, and the

specification . . . of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

Despite this Court's admonitions, *McDonnell Douglas* has indeed become our Book of Common Prayer. It has been "consistently utilized" by the lower courts "when reviewing motions for summary judgment in disparate-treatment cases." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.4 (2003). The courts of appeals unceasingly intone that plaintiffs without direct evidence are remitted to some version of *McDonnell Douglas* burden shifting. *See, e.g., Royall v. National Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 144 (D.C. Cir. 2008) ("[t]he burden-shifting framework set out in [*McDonnell Douglas*] . . . applies to § 1981 employment discrimination claims where, as here, there is no direct evidence that prohibited discrimination caused the adverse employment action"); *Martin v. Brevard County Public Schools*, 543 F.3d 1261, (11th Cir. 2008) (under FMLA, "[a]bsent direct evidence of retaliatory intent, we apply the burden-shifting framework established in [*McDonnell Douglas*]") (footnote omitted); *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1042 (8th Cir. 2007) ("two methods" of proof under the ADEA: "[t]he plaintiff may present direct evidence that age was a motivating factor in the challenged employment decision," or "[i]n the alternative, the plaintiff may rely on the three-stage proof scheme established in [*McDonnell Douglas*]"). Creating this dichotomy between *McDonnell Douglas* and *Price Waterhouse* is error, unsupported by the Court's decisions.

The methods of proving individual claims of disparate treatment under the ADEA and other

statutes are not rigidly compartmentalized, as the Court has recognized. Instead, the proof required in a particular case depends on the circumstances presented. *See, e.g., Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (rejecting *per se* admissibility rule with respect to trial witnesses; "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case"). By way of example, the Seventh Circuit has shown that any number of paths—limited only by the imagination of counsel—may lead to proving discrimination. *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006) (Posner, J.) ("[a] case of discrimination can likewise be made by assembling a number of pieces of evidence none meaningful in itself, consistent with the proposition of statistical theory that a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction") (*citing Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir.1994)). In matters of proof, flexibility is the watchword.

It is true that this Court said in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." But there the Court meant that there was no need for resort to inferences when the challenged policy itself *facially* violated the act ("[s]ince it allows captains who become disqualified for any reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discrimi-

natory on its face"; *id.*). The Court had no occasion in *Thurston* to consider what other evidence might be used to prove discrimination. *See also Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361, 2369 (2008) ("a statute or policy that facially discriminates based on age suffices to show disparate treatment under the ADEA").

The current of this Court's cases under the ADEA —as with all cases construing the federal anti-discrimination acts—has been to reject the lower courts' interposition of additional, straitened or elevated burdens of proof on employees, at least where Congress has not demanded them. *See, e.g., Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2401-03 (2008) (rejecting employer's attempt to shift burden of "reasonable factor other than age" to employee); *Reeves*, 530 U.S. at 146-49 (rejecting a "pretext-plus" requirement); *O'Connor*, 517 U.S. at 311-12 (rejecting requirement that an ADEA plaintiff be replaced by another less than age 40); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419-20 (1985) (employer entitled to no special deference under "bona fide occupational qualification" defense).

Here, in contrast, the Eighth Circuit and the respondent erroneously insist upon a binary mode of analysis not compelled by the ADEA itself or this Court's interpretation of that act. The Court should not accept it.

II. CIRCUMSTANTIAL PROOF IS AS RELEVANT AS DIRECT EVIDENCE, AND THE COURT DOES NOT FAVOR DISTINCTIONS BETWEEN DIFFERENT KINDS OF RELEVANT EVIDENCE

The petitioner's brief and those of other *amici* thoroughly canvass the interplay of *Desert Palace* and *Price Waterhouse*, demonstrating that the Eighth Circuit erred in concluding that "direct evidence" is a prerequisite under the ADEA—as a matter of substantive employment discrimination law—to shifting the burden on the issue of causation. The National Employment Lawyers Association agrees with this analysis and spares its further iteration here.[3]

Instead, NELA adds a further point from the vantage point of trial lawyers—that the Eighth Circuit's and respondent's rule would cut against the grain of "the basic standard of relevance" prevalent in

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[3] The Eighth Circuit simply adopted Justice O'Connor's preference for direct evidence, having concluded that her concurring opinion in *Price Waterhouse* controlled the case. *Gross v. FBL Financial Services, Inc.*, 526 F.3d 356, 359-60 (8th Cir. 2008). Petitioner has shown why this is not so, since a majority of the Court did not see direct evidence as required. Brief for Petitioner at 52-55. Justice O'Connor's role in *Price Waterhouse* was not at all akin to the situation in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which a single justice – Justice Black—truly controlled, siding with four members of the Court on the question whether Congress could lower the voting age to 18 in federal elections, and with the other four on whether Congress possessed like authority in state and local elections. In any event, the Court has long recognized that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace*, 539 U.S. at 100, *quoting Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957).

federal courts, which this Court has recognized "is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). The "direct evidence" standard simply demands too much of plaintiffs to survive scrutiny. An employee age 40 or over, under the general admissibility standards of Fed. R. Evid 401 and 402, ought to be able to introduce any evidence that makes it more likely than not that the mistreatment alleged was "because of" age. 29 U.S.C. § 623(a)(1).

A standard of admissibility begins with the fundamental question of whether a particular kind of evidence is more likely to make a material fact true. Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Thus, the Court rejected a "screening test" to sift out the use of mitigating character evidence in the sentencing phase of a capital murder prosecution. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004). The Court, referring to Rule 401, held that "the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary standard." *Id.* (*quoting McKoy v. North Carolina*, 494 U.S. 433, 440-441 (1990)). The Court likewise deemed admissible the dilutive impact of a reorganization plan under Section 5 of the Voting Rights Act, holding that it was relevant even though it did not by itself prove the intent to discriminate. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 487 (1997) ("[t]he fact that a plan has a dilutive impact therefore makes it more probable that the jurisdiction adopting that plan acted with an intent to

retrogress than it would be without the evidence") (internal quotations deleted).

We never require—whether in life at large or in court—that a particular kind of evidence conclusively establish a fact all by itself. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 631-32 (1989) (even if a urine test is not conclusive about an employee's impairment, "if urine test results disclosed nothing more specific than the recent use of controlled substances by a covered employee, this information would provide the basis for further investigative work designed to determine whether the employee used drugs at the relevant times"); *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) ("evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence'") (*quoting* Fed. R. Evid. 401).

The strength of the evidence is not typically the province of the court, but is the subject of examination at trial. So the Court observed in *Daubert*, 509 U.S. at 596, when it abolished the "general acceptance" hurdle (*i.e.*, the *Frye* test) to admissibility of expert scientific evidence under Fed. R. Evid. 702:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. . . . These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate

> safeguards where the basis of scientific testimony meets the standards of Rule 702.

Id. (citations omitted).

It is most certainly error (as here) for a court to assign priority to particular categories of evidence, and by extension to disregard evidence of a seemingly lesser stripe. *Reeves*, 530 U.S. at 146 (court of appeals erroneously "confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. . . . It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand").

The Court observed in *Aikens*, 460 U.S. at 716, that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." The Court should not demand the impossible from plaintiffs and should reject the "direct evidence" threshold.

III. "MIXED MOTIVE" IS AN INACCURATE AND CONFUSING TERM

Use of the term "mixed motive" to categorize those cases in which the *Price Waterhouse/Desert Palace* approach is invoked is a misnomer, because these cases do not differ from others in the *number* of motives that may coexist. Virtually all EEO cases involve mixed motivation, because a person's actions are rarely animated by a single motive. Certainly *Burdine*'s burden-shifting paradigm was not intended only for "single motive" cases.[4] The genius of *Burdine*

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[4] First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then

is that it "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination," 450 U.S. at 255 n.8, and channels "the factual inquiry . . . to a new level of specificity," *id.* at 255, in which the plaintiff's *prima facie* showing of bias is pitted against the employer's plausible nondiscriminatory rationale. In the end, the trier of fact (typically a jury) "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716. Where the jury concludes that the employer's proffered explanation is not believable, it may (but need not) infer that the real reason was unlawful. *Reeves*, 530 U.S. at 147.[5]

More than a decade before the phrase "mixed motive" was used in *Price Waterhouse*, this Court recognized that Title VII is violated when an

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respond by articulating one or more lawful reasons for the challenged conduct; and finally the plaintiff has the opportunity to prove that one or more of the articulated rationales is not true and is instead a "pretext" for bias. *See Burdine*, 450 U.S. at 452-53.

[5] In this regard, a showing that the employer's reason is pretextual is not necessarily the same as showing that it is factually false. For example, an employer may claim that it fired a long-time employee because she was 10 minutes late to work – the week after she filed an EEO complaint. A factfinder could find that the employee was truly 10 minutes late and still find that the proffered reason was not the real explanation for the employer's decision to fire her. The Sixth Circuit has succinctly summarized the various permutations of pretext as: (1) the proffered reason has no basis in fact, (2) the proffered reason—even if true—did not actually motivate the employer's decision, or (3) the proffered reason was insufficient to warrant the challenged decision. *Johnson v. Kroger Co.*, 319 F.3d 858, 866-867 (6th Cir. 2003). It is this third category—a motivation that is true but insufficient by itself—that covers the presence of multiple motives.

unlawful motivation joins with one or more lawful considerations to cause harm. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), two white employees were fired for theft while an African-American worker, who participated in the theft with them, was retained. *Id.* at 276. The Court did not doubt that theft was a valid basis for firing but ruled that the whites could prove that their employer discriminated by showing that their race caused the disparity in the discipline imposed: "while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination." *Id.* at 283. The employer could have fired all three employees for being involved in the theft, but the factfinder was permitted to infer that the theft was not sufficient to explain the disparity in treatment, and that race was.

In *Santa Fe Trail*, the Court quoted *McDonnell Douglas*, 411 U.S. at 804, as saying that Title VII does not "permit (the employer) to use (the former employee's) conduct as a *pretext* for the sort of discrimination prohibited by (the Act)." 427 U.S. at 282 (emphasis added). The Court addressed the multiple motives issue directly by noting that "[t]he use of the term 'pretext' in this context does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged *solely* on the basis of his race, without regard to the alleged deficiencies." *Id.* n.10 (emphasis added).

Santa Fe Trail illustrates the first problem with use of "mixed motive" terminology: it is simply not accurate. Second, use of the term causes mischief because the converse of mixed motive is seen by some courts as "*sole* motive," imposing an extraordinarily

difficult—and unwarranted—burden on plaintiffs. *See, e.g., Ginger v. District of Columbia*, 527 F.3d 1340 (D.C. Cir. 2008), *reh'g en banc denied* (Jul. 31, 2008), *cert. denied*, ___ S.Ct. ___ (Jan. 12, 2009), in which the D.C. Circuit said:

> There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the *sole* reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. * * * Alternatively, he may bring a "mixed-motive case," in which he does not contest the *bona fides* of the employer's justifications but rather argues race was also a factor motivating the adverse action.

Id. at 1345 (emphasis added).

Even the Ninth Circuit in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (*en banc*), whose judgment was affirmed by this Court in *Desert Palace*, contrasted *Price Waterhouse* situations with those in which "discriminatory animus is the *sole* cause for the challenged employment action." *Id.* at 856 (emphasis original). *See also Sher v. Dept. of Veterans Affairs*, 488 F.3d 489, 508 n.22 (1st Cir. 2007) ("In a mixed motive case, the plaintiff would only have to establish that national origin or religious discrimination was a motivating factor in the analysis, rather than the *sole* basis for the decision.") (emphasis added).

Rather than continuing to use "mixed motive" as a term of art to refer to cases subject to *Price Waterhouse*, it is more appropriate to adopt the language used by Congress and call these "same

action" cases. *See* 42 U.S.C. § 2000e-5(g)(2)(B), which governs the availability of Title VII relief when the plaintiff has proved that discrimination was a motivating factor, and defendant shows it "would have taken the *same action* in the absence" of discrimination (emphasis added). *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.22 (1977) (proof that race was a motivating factor would "have shifted to the Village the burden of establishing that the *same decision* would have resulted even had the impermissible purpose not been considered") (emphasis added).

Unlike "mixed motive," "same action" highlights the salient feature that actually distinguishes *Price Waterhouse* cases: the burden of proof shifts to the defendant to show that it would have made the same decision in a bias-free setting.

CONCLUSION

The judgment of the Court of Appeals should be vacated and the case remanded.

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AMICUS CURIAE BRIEF

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No. 08-441

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IN THE

Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB").[1] NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses nationwide.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and other federal and state employment non-discrimination laws. As potential defendants to claims of discrimination under the ADEA, *amici*'s members have a direct and ongoing interest in the issue presented before this Court concerning what evidentiary standards and burdens of proof should apply in a non-Title VII disparate treatment discrimination case.

SUMMARY OF ARGUMENT

This case does not require the Court to break new ground. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court was called upon to interpret the "because of" language of Title VII, which is identical to the language of the ADEA at issue in this case. It held, through Justice O'Connor's controlling concurrence, that where a plaintiff can present direct evidence that an illegitimate factor played a substantial role in the alleged adverse employment action, the burden of

persuasion can be shifted to the employer to prove that it would have taken the same adverse employment action without consideration of the impermissible factor. This decision continues to govern actions under the ADEA.

The ADEA's language and design are clear: an employer is prohibited from discriminating against an employee "because of" the employee's age. By any dictionary or common understanding of this phrase, along with statements made by this Court in its interpretation of the ADEA, the employee's age must be the but-for cause of the alleged adverse employment action. As such, in the absence of statutory language to the contrary, the plaintiff bears the burden to prove this essential element of liability. The "mixed motive" instruction departs from this requirement. The established direct evidence prerequisite serves a crucial gate-keeping function and has pragmatic value as the minimum protections needed by an employer before that employer is forced to bear a burden of persuasion not placed upon it by Congress or the well-settled civil litigation default rules against which Congress legislates.

The Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), despite protests to the contrary from Petitioner and his *amici*, has no bearing on the outcome of this case. The decisive statutory amendments made to Title VII by the Civil Rights Act of 1991, which were at issue in *Costa*, are tellingly absent from the ADEA, despite Congress' consideration of the ADEA in those amendments and decision to amend another portion of that statute, which is not relevant for the purposes of this appeal. As a result, as this Court has explicitly recognized,

the pre-1991 interpretation of Title VII's identical language continues to govern the ADEA.

At a minimum, this Court should affirm its holding in *Price Waterhouse*. If, however, the Court chooses to revisit that holding, it would better serve Congressional intent to abandon the *Price Waterhouse* approach and reinstate the more familiar and seminal framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and their progeny to govern all disparate treatment claims under the ADEA. This approach is well suited to address multiple motive cases and provides clear and easily applied direction to lower courts. Most importantly, this approach is faithful to the statutory language of the ADEA and civil litigation default rules by keeping the burden of proof on the essential liability issue of causation where it properly belongs: on the plaintiff.

ARGUMENT

I. THE COURT'S PRECEDENT IN *PRICE WATERHOUSE* REQUIRES A PLAINTIFF TO PRESENT DIRECT EVIDENCE THAT AGE PLAYED A SUBSTANTIAL ROLE IN A PARTICULAR EMPLOYMENT DECISION BEFORE SHIFTING THE BURDEN OF PERSUASION TO THE DEFENDANT IN AN ADEA SUIT.

The present case does not require this Court to plant new roots. Rather, it only requires the Court to reinforce previously planted roots. While on the

surface this case presents the question of whether a plaintiff must present direct evidence to obtain a "mixed motive" instruction in a case brought under the ADEA, this case, at its core, goes to the burdens of proof that each party must bear in that litigation. The "mixed motive" instruction, erroneously given by the district court in this case, actually shifts the burden of persuasion to the defendant on the critical liability issue of causation, a necessary element of any successful disparate treatment case under the ADEA.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court addressed "the respective burdens of proof of a defendant and plaintiff" in a Title VII suit prior to Title VII's amendment by the Civil Rights Act of 1991.[2] The result was several different opinions, none of which garnered majority support. Following this Court's directive to look to the position taken by the justice concurring on the narrowest grounds to discern the holding of such a case, the holding of *Price Waterhouse*, as applied to the ADEA, is clear: an employee must present direct evidence that age played a substantial role in a particular employment decision to shift the burden of persuasion to the employer in an ADEA suit via a "mixed motive" instruction.

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[2] *Price Waterhouse* was a sex discrimination case brought under Title VII, but it is equally applicable to the ADEA. In *Price Waterhouse*, the Court was interpreting the statutory language of Title VII, unaffected by the Civil Rights Act of 1991, which prohibits discrimination "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. § 2000e-2(a). The ADEA uses the identical prohibitory language, prohibiting discrimination "because of such individual's age." *See* 29 U.S.C. § 623(a).

A. Justice O'Connor's Concurring Opinion is the Holding of the Court in *Price Waterhouse*.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as reaffirmed in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a unanimous Court established a "careful framework," *Price Waterhouse*, 490 U.S. at 261 (O'Connor, J., concurring), governing evidentiary proof in disparate treatment discrimination cases. Under *McDonnell Douglas*, *Burdine*, and their progeny, the plaintiff's burden is to establish a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. Once the plaintiff has met this burden, the burden of production, but not persuasion, shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *See Burdine*, 450 U.S. at 253-55. To establish liability on the ultimate question of whether the defendant intentionally discriminated against the plaintiff, the plaintiff must then prove that the articulated reasons are pretextual or otherwise unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 805. The *Burdine* Court was careful to emphasize that the burden of persuasion as to liability always remains with the plaintiff. That is, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

All of the *Price Waterhouse* opinions agreed as to the continuing validity of the *McDonnell Douglas*–

Burdine framework.[3] *See Price Waterhouse*, 490 U.S. at 245-47 (plurality opinion), 260 (White, J., concurring), 261-62 (O'Connor, J., concurring), 270 (Kennedy, J., dissenting). The plurality and concurring opinions, however, believed that in certain cases, termed "mixed motive" cases, the burden of persuasion could shift from the plaintiff to the defendant. The plurality would require that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[4] *Id.* at 244-45 (plurality opinion) (footnote omitted). The plurality opinion does not expressly adopt a specific evidentiary standard but states that

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[3] In fact, the dissent, authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia, took the view that continued adherence to this framework was appropriate in all disparate treatment employment discrimination cases. *See Price Waterhouse*, 490 U.S. at 279, 286-293 (Kennedy, J., dissenting). As discussed in Part III, *infra*, *amici* believe that this approach is most in keeping with the statutory language of the ADEA and traditional norms of civil litigation.

[4] All of the Justices in *Price Waterhouse* agreed that if the defendant established that it would have made the same decision even if the impermissible factor did not play a role, the defendant would have no liability. The Civil Rights Act of 1991 did not alter this conclusion in the ADEA context. *See infra* Part II.A. Regardless of the Court's holding as to placement of the burdens of proof, it should continue to follow this holding of *Price Waterhouse*.

its standard is not "meaningfully different" than Justice O'Connor's approach. *Id.* at 250 n.13.

Recognizing the plurality's departure from the *McDonnell Douglas–Burdine* framework and noting the "strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation" resulting from the "mixed motive" instruction, Justice O'Connor found that a "mixed motive" instruction should only be given in disparate treatment cases "where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision."[5] *Id.* at 275 (O'Connor, J., concurring).

This Court's jurisprudence instructs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)); *accord City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988) (describing

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[5] Justice White also filed a concurring opinion, arguing that the Court should apply its precedent in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which involved the First Amendment rather than interpretation of a Congressional statute. *Price Waterhouse*, 490 U.S. at 258-59 (White, J., concurring). Justice White agreed with Justice O'Connor in part that the "mixed motive" instruction is available to plaintiffs who show that the unlawful motive was a substantial factor in the adverse employment action. *Id.* at 259.

the directive of *Marks* as "settled jurisprudence"). Justice O' Connor's concurrence fits this description.

The plurality, Justice White, and Justice O'Connor concurred in the judgment and believed that the burden of persuasion could shift to an employer to disprove but-for causation under certain circumstances. Justice O'Connor, by adding the requirement of direct evidence and thus further limiting the applicability of the Court's holding, "'concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. at 193 (*quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).[6]

Even Justice Kennedy's dissenting opinion in *Price Waterhouse*, which was joined by Chief Justice Rehnquist and Justice Scalia, recognized that Justice O'Connor's concurrence was the holding of the Court:

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6 In his brief, Petitioner Gross attempts to shed the direct evidence requirement of *Price Waterhouse* by arguing that Justice O'Connor's vote was "not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court." *See* Brief for Petitioner at 54. This mathematical analysis misses the point. Justice O'Connor's opinion is the holding of the Court because it explicitly discusses the prerequisite of direct evidence to shift the burden of persuasion to the defendant and is thus the "narrowest ground" supporting the judgment where no rationale enjoys a majority, in accordance with *Marks*. Nowhere in the plurality opinion or concurring opinion of Justice White is the requirement of direct evidence discussed. Indeed, the plurality stated that its standard is not "meaningfully different" than Justice O'Connor's approach, *Price Waterhouse*, 490 U.S. at 250 n.13, and Justice White sought to follow *Mt. Healthy*, a case which itself involved direct evidence.

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.

Price Waterhouse, 490 U.S. at 280 (Kennedy, J., dissenting).[7]

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[7] Justice O'Connor also viewed her *Price Waterhouse* concurrence as the holding of the Court in that case. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003) (O'Connor, J., concurring) ("[P]rior to the Civil Rights Act of 1991, the evidentiary rule we developed to shift the burden of persuasion in mixed-motive cases was appropriately applied only where a disparate treatment plaintiff 'demonstrated by direct evidence that an illegitimate factor played a substantial role' in an adverse employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'CONNOR, J., concurring in judgment).").

Furthermore, the majority of the federal appeals courts have treated Justice O'Connor's concurring opinion as the holding of the Court and continue to apply this holding to disparate treatment cases brought under the ADEA. *See, e.g.*, *King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009) ("Where the plaintiff presents

As a result, the Court need simply follow existing precedent in *Price Waterhouse* that an employee must present direct evidence of discrimination to obtain a "mixed motive" instruction, thus shifting the burden of persuasion to the defendant.

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direct evidence of discrimination, the court analyzes her claim under the mixed-motives framework established in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278-79, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring)."); *Scott v. Potter*, 182 F. App'x 521, 525 (6th Cir. 2006); *Mereish v. Walker*, 359 F.3d 330, 339-40 (4th Cir. 2004) (reciting Justice O'Connor's concurring opinion as the standard for the "mixed motive" framework in ADEA claims and suggesting, without deciding, that this standard continues to govern ADEA claims following passage of the Civil Rights Act of 1991); *Vesprini v. Shaw Contract Flooring Servs., Inc.*, 315 F.3d 37, 41 (1st Cir. 2002) ("As Vesprini adduced no competent 'direct evidence' of Shaw's age-based animus, however, he failed to generate any trialworthy issue of fact enabling him to invoke the *Price Waterhouse* paradigm."); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337 & n.2 (3d Cir. 2002) (noting that an ADEA plaintiff can meet his burden of proof by "presenting direct evidence of discrimination that meets the requirements of Justice O'Connor's controlling opinion in *Price Waterhouse*"); *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1402-03 (7th Cir. 1996).

Even the United States acknowledged that Justice O'Connor's concurrence was the holding of the *Price Waterhouse* court and argued, in its amicus brief submitted during the Court's consideration of *Desert Palace*, that it should continue to be followed. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 10-16, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

B. The Court's Holding in *Price Waterhouse*, through Justice O'Connor's Concurring Opinion, has Pragmatic Value as the Minimum Protection Required Prior to Forcing Employers to Disprove that an Employment Action was Taken "because of" Age.

Price Waterhouse takes the drastic step of shifting the burden of persuasion to the defendant on the critical liability issue of causation. This is done absent Congressional direction and in contravention of both the default civil procedure rules under which the plaintiff bears the burden of persuasion to prove liability and this Court's pronouncement in *Burdine* that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. Justice O'Connor took great pains to ensure that this "strong medicine" was administered fairly. *See Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). Requiring the plaintiff to present direct evidence, as a precondition to ridding himself of having to prove causation, is the minimum protection required prior to forcing a defendant to disprove that an employment action was taken "because of" age.

1. The ADEA requires but-for causation.

The plain language of the ADEA requires that a plaintiff alleging disparate treatment age

discrimination establish but-for causation. *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("[A] disparate treatment [age] claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."); *see also Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008) (quoting and emphasizing *Hazen Paper Co.* for the same proposition); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (*citing Hazen Paper Co.* for the same proposition). The ADEA provides, in part, that it shall be unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added).

The phrase "because of" is not defined in the statute. As a result, the Court looks to the language's ordinary meaning for its interpretation. *See, e.g.*, *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009).

Both before and after the enactment of the ADEA, "because of" has been consistently defined as "by reason of" or "on account of," suggesting a direct cause and effect relationship, or but-for causation. *E.g.*, *American Heritage College Dictionary* 121 (3d ed. 2000) (defining "because of" as "by reason of" or "on account of"); *The American Heritage Dictionary of the English Language* 163 (3d ed. 1992) (same); *Webster's Ninth New Collegiate Dictionary* 139 (1988) (same); *The Compact Edition of the Oxford English Dictionary* 746 (1971) (same); *Webster's New International Dictionary of the English Language*

242 (2d ed. 1947) (same). This comports with everyday usage of the phrase. When individuals speak of one action occurring "because of" another action, a direct cause and effect relationship is presumed.

One would not say that Action B occurred because of Action A unless Action A was a determinative cause of Action B. *See Price Waterhouse*, 490 U.S. at 281 (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").[8] As

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[8] The question of whether the phrase "because of" required but-for causation was a subject of discussion in *Price Waterhouse*. Justice O'Connor, in her concurring opinion, and Chief Justice Rehnquist and Justices Kennedy and Scalia in dissent held that a but-for causal relationship was clearly required, *see Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring) ("The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."), 281-82 (Kennedy, J., dissenting) ("Congress could not have chosen a clearer way to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue."). These Justices also agreed that the burden of proving but-for causation remained on the plaintiff, except that Justice O'Connor would permit the burden to shift to the defendant in the face of direct evidence establishing that an illegitimate factor played a substantial role in the adverse employment action. *Id.* at 270 (O'Connor, J., concurring); 286-90 (Kennedy, J., dissenting). Justice White expressly declined to decide whether but-for causation was required. *See id.* at 259 (White, J., concurring). As correctly noted by the dissent, although the plurality stated that but-for

a result, the statutory language of the ADEA clearly and unambiguously requires but-for causation and must be given effect. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citations omitted) (noting that the starting point for analysis is the statutory text and that the judicial inquiry is complete where that text is unambiguous).

But-for causation is a critical element of ADEA liability. If a supervisor's consideration of a person's age (Action A in the previous example) did not result in that person's termination (Action B in the previous example), it cannot be said that an ADEA violation occurred. The person was not terminated "because of," "by reason of," or "on account of" his or her age. Failure to so hold would dramatically transform and expand the ADEA into legislation aimed at punishing disagreeable thoughts rather than remedying illegal actions.

2. The "mixed motive" instruction impermissibly shifts an essential ADEA liability element to the defendant.

The text of the ADEA is silent as to which party should bear the burden of persuasion as to the critical causation element of liability. As a result, it

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causation was not required, *id.* at 239-42 (plurality opinion), its conclusion that the defendant could avoid liability by showing that it would have made the same decision absent consideration of the impermissible factor shows that its interpretation actually requires but-for causation. *See id.* at 283 (Kennedy, J., dissenting).

can be presumed that Congress legislated against the backdrop of the well-entrenched principle that the plaintiff bears the burden of proving each element of liability, including the causation element. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA [Individuals with Disabilities Education Act] is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims."). Congress has given no indication that it intended a contrary result.[9] *See id.* at 57-58 ("Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.").

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[9] While espousing the virtues of civil litigation defaults, Petitioner resorts to a legal sleight-of-hand to reach the outcome he seeks. He argues that this shift in burden of persuasion is appropriate because the employer has already been shown to be a wrongdoer. *See* Brief for Petitioner at 50-51. This is simply inaccurate. The employer has not been shown to be a wrongdoer because but-for causation, the very burden that Petitioner and his *amici* seek to cast upon defendants, has not yet been established. The ironic result is that the norms of civil litigation that Petitioner so rightfully espouses would be turned on their proverbial heads if Petitioner and his *amici* have their way.

3. Equity requires that the defendant not bear the burden of proof on an essential ADEA liability element until, at a minimum, the plaintiff has put forth direct evidence of age discrimination.

Petitioner's and his *amici*'s preference to shift the burden of persuasion to the defendant to disprove but-for causation is not surprising. It relieves him and other plaintiffs in disparate treatment age cases from having to prove a critical element of liability. The Court's holding in *Price Waterhouse*, through Justice O'Connor's concurring opinion, recognized this danger. Requiring direct evidence as a prerequisite to shifting the burden of persuasion is a pragmatic approach aimed at limiting the judicially created shift in burden of persuasion to those cases most likely to reflect unlawful discrimination. Among the pragmatic benefits achieved by adhering to this careful balance are: protecting the rights of employers and employees, providing a clear and workable rule to be applied by lower courts, conserving judicial resources, and guarding against liability based not on age but on factors often correlated with age.

Our American economic system is premised on the freedom of employers to direct and manage their businesses. This is reflected throughout the law, from our strong traditions of at-will employment, *see, e.g.*, *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324 (1972) (noting "common-law rule" that "employment is terminable by either party at will"), to the unwillingness of courts to substitute their

judgment for that of an employer on business decisions, *see, e.g.*, *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination."). On the other hand, employees have the right to not be judged on immutable characteristics such as age. *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (*quoting W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985)).

The ADEA was meant to protect this balance of interests by barring employers from taking action against an employee on account of the employee's age, while simultaneously preserving the employer's wide latitude to run its business free from interference. Requiring the employer to disprove discrimination drastically alters this balance.[10] Prior to casting this enormous burden on an employer, it is appropriate that an employee asserting disparate

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[10] Furthermore, shifting the burden to a defendant can greatly increase the likelihood that a defendant will be penalized for making legitimate business decisions but communicating or executing those decisions in a less-than-perfect manner. Even human resource professionals at large corporations such as Respondent are not infallible and may occasionally handle communications with an employee with less thoughtfulness or foresight than preferable. While *amici* do not condone such behavior, such behavior does not automatically equate to discrimination. Requiring direct evidence to shift the burden of persuasion will help avoid liability for nondiscriminatory behavior.

treatment age discrimination provide direct evidence (rendering the need to make error-prone inferential leaps in logic unnecessary) that age did in fact cause the challenged employment action. This ensures that the standard litigation norm that a plaintiff must bear the burden of proof on the elements essential to his or her claim is set aside only in a limited number of cases that are more likely to be infected with discrimination.[11]

Requiring direct evidence prior to shifting the burden of persuasion on the critical liability element of causation also provides a bright-line and workable rule to be followed by lower courts struggling to determine whether to analyze a case or instruct a jury in accordance with the standard *McDonnell Douglas–Burdine* framework or more employee-friendly *Price Waterhouse* approach.[12] It will also

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[11] In its *Desert Palace amicus* brief, the United States made this same point in urging the Court to continue to adhere to the direct evidence requirement of *Price Waterhouse* in Title VII. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 10, 29, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

[12] As even Petitioner and his *amici* recognize, eliminating the crucial gate-keeping function served by the direct evidence requirement would nullify any distinction between those cases to be governed by the *McDonnell Douglas–Burdine* framework and those that would receive the causal boost of the "mixed motive" instruction. Instead of following the well-traveled path of *McDonnell Douglas*, *Burdine*, and their progeny, however, Petitioner and his *amici* would opt for the "mixed motive" instruction, thus shifting the burden of persuasion on causation to the defendant in all cases that proceed to trial. This is directly contrary to one point on which all Justices in *Price Waterhouse* agreed,

provide greater certainty to litigants and conserve judicial resources. Failure to provide a workable directive to lower courts will only sow confusion, increasing the number of appeals. [13]

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namely that the "mixed motive" instruction was not meant to replace the *McDonnell Douglas* line of cases. *See supra* Part I.A. As articulated in Part III, *infra*, *amici* urge the Court to decline this invitation and find that the *McDonnell Douglas–Burdine* framework should govern all disparate treatment age claims. Short of reinstating the *McDonnell Douglas–Burdine* framework to govern all disparate treatment age claims or adhering to the direct evidence requirement of *Price Waterhouse*, the Court must make clear that any "mixed motive" instruction must be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action. The "mixed motive" instruction should not be allowed to replace *McDonnell Douglas*, thereby effectively shifting the burden of persuasion to employers in all ADEA cases.

[13] Petitioner and his *amici* spend much time attempting to demonstrate how lower courts have struggled to determine what constitutes direct evidence sufficient to trigger the *Price Waterhouse* "mixed motive" instruction. *See, e.g.*, Brief for Petitioner at 33-42. Even if this difficulty did exist, it does not justify throwing the baby out with the bathwater. It simply argues for further guidance from this Court as to what constitutes sufficient direct evidence. Furthermore, eliminating the direct evidence requirement would exacerbate rather than assuage the concern of Petitioner and his *amici*. Courts would not only have to look to the quality of evidence but would become bogged down in the more problematic and error-prone inquiry as to whether the quantity of circumstantial evidence is enough to cross an elusive threshold necessary to trigger a "mixed motive" instruction. This will only

This heightened evidentiary burden, in addition to providing clarity, is particularly appropriate for age discrimination cases. Age, unlike other protected characteristics such as race or sex, is often correlated with perfectly legitimate, nondiscriminatory factors such as years of service and pay rate. *See Hazen Paper Co.*, 507 U.S. at 608 (noting that pension status and seniority are correlated with age). Requiring direct evidence to shift the burden of persuasion to the employer helps to ensure that age, rather than a correlate of age, is actually the determinative factor behind the employer's action. *See Mereish v. Walker*, 359 F.3d 330, 340 (4th Cir. 2004) ("And maintaining the higher evidentiary burden in *Price Waterhouse* for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions.").

But-for causation is a critical liability element to be proved by a plaintiff asserting disparate treatment age discrimination. If the Court is to shift this burden of persuasion to the defendant, the Court should require the plaintiff at least to present direct evidence of such discrimination to ensure that defendants receive the minimum level of protection equitably required prior to being saddled with this heavy burden. Short of adhering to this direct evidence prerequisite or reinstating the *McDonnell Douglas–Burdine* framework to govern all disparate treatment age claims, as urged in Part III, *infra*, the Court must make clear that any "mixed motive"

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intensify the practical problems solved by the requirement of direct evidence.

instruction is to be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action.[14]

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[14] Petitioner and his *amici* make a number of arguments in support of shifting the burden of persuasion on causation to defendants, each of which is unavailing. Petitioner's *amici* argue, for example, that "[b]ecause direct evidence is extremely rare, most plaintiffs will be unable to obtain a mixed-motive instruction." *See* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, Asian American Justice Center, et al. in Support of Petitioner at 23. This argument, even if true, misses the point. It starts from the incorrect assumption that plaintiffs in ADEA disparate treatment cases are *entitled* to the "mixed motive" instruction as a matter of course, despite the utter silence from Congress of its intention to alter the standard civil rule that plaintiffs bear the burden of persuasion on all liability elements critical to their claim. If Congress had wanted to alter this standard civil rule, which is precisely the result of the "mixed motive" instruction, it could have clearly said so, as it did in amending Title VII. *See infra* Part II.A. The "mixed motive" instruction should be reserved for those cases where discrimination may be especially likely.

The National Employment Lawyers Association makes a similar evidentiary argument in its *amicus* brief, arguing that "[a]n employee age 40 or over, under the general admissibility standards of Fed. R. Evid 401 and 402, ought to be able to introduce any evidence that makes it more likely than not that the mistreatment alleged was 'because of' age." Brief of National Employment Lawyers Association as *Amicus Curiae* in Support of Petitioner at 13. This is surely correct but again misses the point. The harm flowing from the "mixed motive" instruction is that it relieves the employee from having to prove that the "mistreatment

II. THE COURT'S DECISION IN *DESERT PALACE, INC. V. COSTA* HAS NO BEARING ON THIS CASE.

A. The Court's Decision in *Desert Palace v. Costa* was a Direct Result and Application of Statutory Amendments Made Only to Title VII, and Not the ADEA, by the Civil Rights Act of 1991.

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), this Court was called upon to examine Title VII, as that statute was amended by the Civil Rights Act of 1991. It held that direct evidence is not

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alleged was 'because of' age," instead requiring the employer to disprove that the "mistreatment alleged was 'because of' age" once the employee shows that age may have been considered. The requirement of direct evidence serves the crucial gate-keeping function of preventing this exception from swallowing the rule.

There is every reason to believe that plaintiffs will have access to, and be able to present, any relevant evidence that exists to meet a burden of persuasion on causation. Any arguments that it is more equitable to shift the burden of persuasion to the employer to disprove but-for causation because of superior access to evidence is not only irrelevant given the statutory text but factually questionable. "[T]he suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files." *Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) (*citing Burdine*, 450 U.S. at 258). This is equally true in the ADEA context.

required to obtain a "mixed motive" instruction in disparate treatment claims brought under Title VII, as amended by the Civil Rights Act of 1991. In so holding, the Court correctly saw no need to decide whether Justice O'Connor's concurring opinion is the holding of *Price Waterhouse*, since that holding could no longer be applied to Title VII in light of the subsequent amendments to Title VII in the Civil Rights Act of 1991.

The but-for causal connection required by the "because of" language in Title VII was modified by two dispositive amendments in the Civil Rights Act of 1991, which amendments were not made to the ADEA. Specifically, pursuant to the Civil Rights Act of 1991, Title VII now provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor for any employment practice, even though other factors also motivated the practice.*" 42 U.S.C. § 2000e-2(m) (emphasis added). Coupled with this change is 42 U.S.C. § 2000e-5(g)(2)(B), which limits the remedies that can be imposed on a defendant "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor."

The practical effects of these amendments are twofold: (1) the but-for causation standard of Title VII is replaced with "a motivating factor" standard, "even though other factors also motivated" the adverse employment action, and (2) once this reduced causal burden is met by the plaintiff, the burden shifts to the defendant *by statute* to show

that the same action would have been taken absent the impermissible motivating factor. Perhaps most importantly, Congress defined the term "demonstrates" to mean "meets the burdens of production and persuasion," 42 U.S.C. § 2000e(m), without requiring the heightened showing previously required for Title VII under *Price Waterhouse*.

In light of these clear statutory changes, the Court had little difficulty concluding that a Title VII plaintiff is not required to produce direct evidence to obtain a "mixed motive" instruction. *Desert Palace, Inc.*, 539 U.S. at 101-02.

Tellingly, Congress did not similarly modify the "because of" language in the ADEA. This clearly was not an oversight, given that Congress did amend a portion of the ADEA not relevant to this case in the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C. § 626(e)) (relating to statute of limitations under ADEA).

As a result, the Civil Rights Act of 1991 has no bearing on this case, and Justice O'Connor's controlling opinion in *Price Waterhouse* remains the authority on obtaining a "mixed motive" instruction under the ADEA. *See, e.g.*, *Mereish*, 359 F.3d at 339-40) (reciting Justice O'Connor's concurring opinion as the standard for the "mixed motive" framework in ADEA claims and expressing doubt that the Civil Rights Act of 1991 altered this approach). Indeed, as this Court previously recognized in the disparate impact context, because the 1991 amendments made to Title VII were not made to the ADEA, the ADEA continues to be construed in accordance with the Court's pre-1991 Title VII decisions. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005)

("While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."). This reasoning in *Smith* is directly applicable here. If the ADEA is to be interpreted as if it had language analogous to 42 U.S.C. § 2000e-2(m), this should be done by Congress and not this Court. Congress' failure to amend this portion of the ADEA in the Civil Rights Act of 1991 is strong evidence that it intended to leave the ADEA as it was: subject to the holding of *Price Waterhouse* based on the concurring opinion of Justice O'Connor.

B. Congress' Decision to Amend Only Title VII and Not the ADEA is in Keeping with its Historical Preference to Treat Discrimination under Title VII and the ADEA Differently.

Since the ADEA's inception in 1967, only three years after Title VII's enactment, Congress has used different tools to combat age discrimination and discrimination based on traits protected by Title VII. Most evident is that when Congress decided to prohibit age discrimination, it did not simply amend Title VII. In fact, both the U.S. House of Representatives and the Senate struck down amendments that would have added age as a protected characteristic in the legislation that became Title VII. *See EEOC v. Wyoming*, 460 U.S. 226, 229 (1983), *superseded by statute*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3, 100 Stat. 3342, 3342 *as*

recognized in McCann v. City of Chicago, 968 F.2d 635, 636 (7th Cir. 1992). Rather, Congress created the ADEA, with significant structural differences from Title VII.

Among these key structural differences are the enforcement mechanisms of Title VII and the ADEA. Whereas a private Title VII suit may proceed as a class action under the familiar opt-out procedure of Federal Rule of Civil Procedure 23, *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) ("An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)." (*quoting Gen. Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 330 (1980))), Congress limited a plaintiff's ability to bring a class-type claim under the ADEA by incorporating the unique statutory opt-in procedure of the Fair Labor Standards Act, *see* 29 U.S.C. § 626(b) (stating that the provisions of the ADEA are to be enforced in accordance with the Fair Labor Standards Act); 29 U.S.C. § 216(b) (prescribing opt-in procedure for class-type claims, termed collective actions, brought under the Fair Labor Standards Act); *see also Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) (noting that the ADEA incorporates the enforcement provisions of the FLSA and addressing an issue relating to opt-in collective actions under the ADEA). The two statutes also differ in available remedies. The ADEA, for example, allows for liquidated damages in the case of

willful violations but not for punitive or compensatory damages.[15] *See* 29 U.S.C. § 626(b).

Congress' policy choice to treat age discrimination differently than other types of employment discrimination is not surprising given that discrimination based on age differs from the types of discrimination prohibited by Title VII. As this Court has explained, "'age discrimination rarely was based on the sort of animus motivating some other forms of discrimination.'" *Hazen Paper Co.*, 507 U.S. at 610 (*quoting EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)). Rather, age discrimination "was based in large part on stereotypes," such as decreased productivity of older workers. *Id.* In addition, unlike other types of employment discrimination, age is often correlated with other factors, such as pay and years of service, making it especially critical to accurately discern and punish only discrimination on account of age, rather than discrimination based on pay, seniority, or other legitimate factors that may appear at first glance to be age-related. It is thus reasonable that Congress, in enacting the Civil Rights Act of 1991, chose to reduce the plaintiff's burden in Title VII cases, while choosing not to make corresponding changes to the ADEA.

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[15] Coverage under the two statutes can also differ. *Compare, e.g.*, 42 U.S.C. § 2000e(b) (defining Title VII employer as having a minimum of fifteen employees) *with* 29 U.S.C. § 630(b) (defining ADEA employer as having a minimum of twenty employees).

III. IF THE COURT IS TO REVISIT ITS HOLDING IN *PRICE WATERHOUSE*, IT SHOULD HOLD THAT NO SPECIAL FRAMEWORK IS APPROPRIATE FOR "MIXED MOTIVE" CASES. THE *MCDONNELL DOUGLAS-BURDINE* FRAMEWORK IS ADEQUATE TO ADDRESS "MIXED MOTIVE" CASES AND MORE FAITHFUL TO THE PLAIN LANGUAGE OF THE ADEA THAN THE *PRICE WATERHOUSE* APPROACH.

As discussed previously, *see supra* Part I.B, limiting access to the "mixed motive" instruction to those plaintiffs who present direct evidence of discrimination (*i.e.*, the holding of the Court in *Price Waterhouse*), is a way to accommodate perceived competing interests while at the same time limiting the frequency of departure from the statutory text and default rules of civil litigation as to the burden of persuasion. That is, the direct evidence requirement serves the critical gate-keeping function of protecting a defendant from being saddled with a burden that is not properly his under the ADEA or the norms of civil litigation. While this may be one possible policy choice and is the minimum protection required for a defendant under the ADEA, it is not the approach most in harmony with the statutory text and civil litigation defaults. If the Court is to revisit its holding in *Price Waterhouse*, *amici* urge the Court to do away with the "mixed motive" instruction in the ADEA and allow all disparate treatment ADEA claims to be governed by the familiar and well-travelled *McDonnell Douglas–Burdine* framework.

No special analytical framework is required to adequately address multiple motive cases because

every case is a "mixed motive" case that can be properly decided under the *McDonnell Douglas–Burdine* framework.[16] Rarely will a trier of fact in a discrimination case be presented with only one potential motive (indeed, rarely will an employer's decision be influenced by only one motive). Once the employee presents a prima facie case of discrimination under the *McDonnell Douglas–Burdine* framework, an employer will almost always articulate one or more legitimate, nondiscriminatory reasons for the employment action in question. At that point, the trier of fact will be called upon to decide which of the offered explanations, either alone or in combination, was the cause of the challenged employment action.[17]

The articulation of a special evidentiary framework to govern "mixed motive" cases serves

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16 Petitioner's *amici* make this same point. *See* Brief of National Employment Lawyers Association as *Amicus Curiae* in Support of Petitioner at 15-19; Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 8-11. Rather than adhering to the *McDonnell Douglas–Burdine* framework, however, they seek to effect a legal coup by transplanting the changes made to Title VII by the Civil Rights Act of 1991 to the ADEA, although the ADEA was not similarly amended by Congress.

17 It is incorrect to assert, as Petitioner and some of his *amici* do, that the *McDonnell Douglas–Burdine* framework has nothing to do with causation. *See, e.g.*, Brief for Petitioner at 56; Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 4-5. The entire framework is built around shifting presumptions of causation aimed at resolving the ultimate question of intentional discrimination.

only to foster confusion. Courts will be called upon to preliminarily determine the critical factual issue as to whether the plaintiff has met the burden required to obtain a "mixed motive" instruction. If the court decides in the affirmative, the jury will be instructed as to the now-shifting burdens of persuasion, likely resulting in confusion for the jury. In all too many cases, the jury will make the undetectable and irremediable error of requiring the defendant to bear the entire burden of persuasion. More importantly, the "mixed motive" instruction departs from the statutory text of the ADEA, which requires but-for causation as an element of liability to be proved by the plaintiff in accordance with standard civil litigation default rules.[18] *See supra* Parts I.B.1, I.B.2. The *McDonnell Douglas-Burdine* framework allows for the consideration of multiple or "mixed" motives, while keeping the burden of persuasion properly on the plaintiff to prove the causation element of liability.

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, made exactly this point in *Price Waterhouse*:[19]

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[18] It is primarily this reason that renders unworkable *amici* American Association for Justice's suggestion that every plaintiff asserting disparate treatment discrimination, whether under the ADEA or otherwise, should be permitted to choose the more beneficial "mixed motive" jury instruction codified in Title VII by the Civil Rights Act of 1991. *See* Brief of American Association for Justice as Amicus Curiae in Support of Petitioner at 14.

[19] The United States also agreed with this approach in its *amicus curiae* brief submitted to this Court during its consideration of *Price Waterhouse*. *See* Brief for the

> I would adhere to this established [*McDonnell Douglas–Burdine*] evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

Price Waterhouse v. Hopkins, 490 U.S. 228, 287 (1989) (Kennedy, J., dissenting). Justice Kennedy noted that the confusion is likely to be greatest in cases brought under the ADEA. *Id.* at 292. *Amici* NFIB and SHRM agree with this approach and urge the Court to abandon the *Price Waterhouse* approach in favor of the single *McDonnell Douglas–Burdine* framework, which provides clear direction to lower courts, allows for consideration of multiple motives, and properly keeps the burden of persuasion on the employee alleging a violation of law.

United States as Amicus Curiae at Part I.C, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

CONCLUSION

Petitioner and his *amici* urge this Court to cast precedent aside and hold that direct evidence is not required to obtain a "mixed motive" instruction shifting the burden of proof to the defendant in an ADEA disparate treatment case. For the reasons previously described, the Court should decline this invitation and, at a minimum, hold that direct evidence is required to obtain a "mixed motive" instruction under the ADEA, thus affirming its holding in *Price Waterhouse* and the decision of the Eighth Circuit. If, however, the Court chooses to revisit *Price Waterhouse*, it should adopt the familiar *McDonnell Douglas–Burdine* framework to govern all cases alleging disparate treatment under the ADEA, including the present case. Short of following one of these two preferable approaches, the Court should make clear that any "mixed motive" instruction is to be reserved exclusively for those limited number of cases in which the trial court determines that no reasonable fact finder could conclude that age was not a substantial factor in the challenged employment action.

Respectfully submitted,

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March 4, 2009

AMICUS CURIAE BRIEF

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No. 08-441

IN THE
SUPREME COURT OF THE UNITED STATES

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National School Boards Association ("NSBA") is a not-for-profit federation of state school board associations from throughout the United States, the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA and the members of its federation together currently represent over 95,000 school board members who govern some 14,000 local school districts employing almost 6.4 million people.[1]

NSBA's mission is to foster excellence and equity in public education through school board leadership. As part of its mission, NSBA supports the reasonable application of anti-discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools. In this case, NSBA seeks to provide the Court with concrete examples of employment decisions faced by public school districts in which a rule that placed the burden of proof on employers in a disparate treatment suit under the Age Discrimination in Employment Act, 29 U.S.C. § 623 (2008) ("ADEA") would hamper school districts' ability to accomplish their educational mission.

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

School districts employ a variety of sensible employment criteria designed to improve educational achievement. Some employment decisions may favor employees with more current and relevant training and experience, who may be younger, but such employment decisions should not be deemed discriminatory where a district was not actually motivated by age.

SUMMARY OF THE ARGUMENT

The Court's decision in this matter will establish the burdens each party carries in an age discrimination case. This decision will especially affect our nation's public schools, which employ more than six million workers.[2] Public schools must employ those equipped to use cutting edge strategies to teach our nation's children and whose salaries fit within an ever-shrinking budget.

To do so, school employers must take employment actions—such as hiring recently-trained or lower-paid teachers or prohibiting talented teachers with greater seniority from transferring out of poorly performing schools—that, although non-discriminatory, statistically may favor workers under 40. These decisions, whether in response to breathtaking budget cuts, federal mandates such as

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[2] *See* U.S. Department of Education, Institute of Educational Sciences, Digest of Education Statistics: 2007, Staff Employed in Public Elementary and Secondary School Systems, by Functional Area: Selected Years, 1949-50 Through Fall 2005 (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_077.asp?referrer=list.

No Child Left Behind, or a need for teachers trained in a new discipline, are necessary to serve our nation's children.

Shifting the burden to favor plaintiffs in age discrimination cases will inhibit schools from making these necessary choices. One purpose of employment law is to make whole victims of invidious discrimination, and another is to motivate employers to avoid discriminatory decisions. The law does not compel employers to establish certain workforce demographics, however. Shifting the burden in age cases to favor plaintiffs will create incentives for artificial demographic balance as litigation prevention. By allowing a shifting of the burden of proof in an age discrimination matter, as Petitioner requests, the Court will render schools more vulnerable to unfounded discrimination claims challenging decisions not motivated by discrimination that statistically favor workers under 40. Accordingly, shifting the burden to favor plaintiffs in these cases will force school boards to choose between taking actions to promote student achievement and actions to avoid employment litigation. Such a shift will hinder schools in making non-discriminatory decisions in the best interests of America's children.

To prevent this outcome, this Court should clarify its anti-discrimination doctrine by holding that to prevail in an age discrimination case, a plaintiff must prove that age was the but-for cause of a challenged employment decision. This rule best honors the statutory text, the conventional rules of civil litigation, and the interest in preserving

employer autonomy to make non-discriminatory management decisions.

Alternatively, should the Court find that in some instances burden-shifting is appropriate, the rule requiring plaintiffs to present direct evidence of discrimination before obtaining a mixed motive jury instruction in non-Title VII cases, set out by Justice O'Connor's controlling opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), should be preserved. Doing otherwise and ruling as Petitioner requests would impose on public school boards a heavy burden to make overly prophylactic employment decisions to the detriment of our children's education.

I. To Preserve the Balance Required for American Public Schools to Serve Students, This Court Must Require Plaintiffs to Carry the Burden of Proving Invidious Discrimination.

The Court's decision in this case will impact our nation's public schools' ability to carry America's children into the Twenty-First Century. The demands facing public schools sometimes require employment practices that statistically favor workers under 40, such as stopping the flight of experienced teachers from high-needs schools, hiring recently-trained administrators, or replacing higher paid teachers with lower paid ones. While not motivated by age discrimination, these practices often result in greater benefits to younger workers, making schools vulnerable to unfounded claims of disparate treatment. The cost of that litigation deters school boards from making decisions

necessary to boost student achievement. Schools should have the flexibility to govern in non-discriminatory ways that best serve our nation's children. For this reason, this Court should not impose on defendants the unusual and onerous burden of proof of causation promoted by Petitioner.

The ADEA prohibits employers from taking an adverse employment action against an individual "because of" the individual's age. 29 U.S.C. § 623(a) (2008). This case calls on the Court to determine the burden a plaintiff must meet in showing an action was taken "because of" age. This is an issue of causation.

Nowhere in the language of the ADEA did Congress place upon employers the burden to disprove causation. This Court has made clear in the age discrimination context that "a disparate treatment claim cannot succeed unless the employee's [age] played a role in the process *and had a determinative influence on the outcome*." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added). And the burden of proving that age was a determinative influence is the plaintiff's alone. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (the burden of proving intentional discrimination "remains at all times with the plaintiff"). Accordingly, to prevail on an age discrimination claim, a plaintiff must show that age was the but-for cause of the challenged employment decision.[3] This rule best safeguards the balance

[3] This standard reflects this Court's command that conventional rules of civil litigation apply to federal employment discrimination statutes, including the ADEA.

between permitting plaintiffs to prove invidious discrimination where it exists and respecting employers' autonomy to make policy decisions unmotivated by discriminatory animus.

Preserving this balance is especially important in the context of age discrimination. This Court has explained, "it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005), *quoted in Meacham v. Knolls Atomic Power*, 128 S. Ct. 2395, 2406-07 (2008). Because employment benefits commonly increase with seniority, "many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers." *Smith*, 544 U.S. at 259 (O'Connor, J., concurring). Thus, this Court has observed Congress's recognition of the "distinctive nature of age discrimination, and the need to preserve a fair degree of leeway for employment decisions with effects that correlate with age." *Meacham*, 128 S. Ct. at 2406-07. Public school employers need this "leeway" to make non-discriminatory employment decisions that best serve students.

Meacham, 128 S. Ct. at 2406 ; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

II. Alternatively, If The Court Finds That Burden-Shifting Is Appropriate In Some Instances, The Court Must Require Plaintiffs to Present Direct Evidence Of Discrimination To Obtain A Mixed-Motive Instruction In ADEA Cases.

Even if this Court finds that in some instances it is appropriate to shift the burden in an ADEA case, the rule requiring plaintiffs to present direct evidence of discrimination to obtain a mixed-motive instruction should be preserved. In *Price Waterhouse v. Hopkins*, Justice O'Connor wrote concurring in the judgment that to obtain a mixed-motive instruction in a disparate treatment case—thereby shifting the burden to the employer to prove it would have taken the disputed employment decision absent consideration of the protected characteristic—a plaintiff must "show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 490 U.S. at 276. Justice O'Connor's concurrence, as the narrowest opinion of the Court, is the governing opinion in *Price Waterhouse*.[4]

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[4] *See Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1113 (3d Cir. 1997) (Alito, Circuit Justice). This view of Justice O'Connor's opinion reflects the Court's discussion in *Marks v. United States*, stating: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193 (1977). Although the Court has cast doubt on the *Marks* "narrowest grounds" test in certain cases, *see Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), *Marks* remains this Court's most direct

Justice O'Connor's "direct evidence" requirement recognizes the danger in straying too far from this Court's well-settled rule that a disparate treatment plaintiff "bears the burden of persuasion throughout the litigation." *Id.* at 270. While basing an employment decision on a protected characteristic like age harms both the individual and society, employment discrimination laws are not aimed at *requiring* a certain demographic balance in the workforce. Shifting the burden allocation in an ADEA case in the manner Petitioner proposes would have the practical effect of doing just that. Justice O'Connor's *Price Waterhouse* concurrence, while imperfect, nonetheless recognizes the critical balance employment discrimination laws must strike between eradicating invidious discrimination without forcing employers to engage in what this Court has termed "inappropriate prophylactic measures" overcompensating for non-discriminatory disparities. *Id.* at 274 (citation omitted).

III. Shifting Burdens To Favor Plaintiffs In ADEA Cases Will Undermine Our Schools' Ability To Serve Public School Students.

Public schools must prepare our children to be productive citizens and competitors in an increasingly global marketplace. Thus, they face the challenge of improving achievement while anticipating and meeting the unique needs of the changing population of school children. School

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guidance for interpreting decisions when no majority adopts a given reasoning.

boards must employ and retain those who possess current skills and are therefore best able to meet these requirements. Shifting burdens to favor plaintiffs in ADEA cases will inhibit schools from making non-discriminatory employment decisions that best serve students.

A. America's Schools Must Do More With Less.

1. Public Schools Must Meet Numerous State and Federal Mandates in Serving America's Children.

Public schools face unprecedented and unrelenting challenges in meeting the demands of the Twenty-First Century. Some of these challenges arise from federal and state laws requiring both increased student achievement and specialized instruction for those who most need it. Not the least of these challenges is the No Child Left Behind Act of 2001 ("NCLB"), which aims to "ensure that all children have a fair, equal, and significant opportunity to obtain high-quality education and reach, at a minimum, proficiency on challenging State academic assessments." 20 U.S.C. § 6301 (2009).[5] Likewise, the Individuals with Disabilities

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[5] This goal is measured primarily through student attainment of adequate yearly progress ("AYP") on state assessments. 20 U.S.C. § 6301(6). A school that fails to "make AYP" goals faces certain NCLB-specified sanctions, including the replacement of school staff determined to be "relevant" to the school's AYP failures. 20 U.S.C. § 6316(b)(7)(C)(iv)(I).

Education Improvement Act, commonly referred to under its pre-reauthorization name, IDEA, requires public schools to provide individualized free appropriate education to students with disabilities. 20 U.S.C. § 1401(3)(A) (2008). Similarly, the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.* (2009), requires public schools to meet the unique needs of homeless youth. Public schools must also help non-native English speaking students or English Language Learners ("ELLs") to overcome language barriers and participate equally in the educational program. *See* Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703 (2009); *see generally Lau v. Nichols*, 414 U.S. 563 (1974). These laws are a sampling of the federal and state programs that require schools to increase academic achievement overall and meet the unique needs of specific students.

School professionals must be equipped with a growing set of skills and qualifications to meet the staffing implications of these laws. For example, NCLB requires schools to hire teachers who are "highly qualified." Additionally, NCLB contemplates significant staffing changes in schools where student test scores have not met federal standards. To implement NCLB, school administrators must be better versed in testing, instruction strategies, curriculum formation, and data analysis than ever before.[6] Additionally, to comply with specialized

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[6] Kevin Butler, *Principal Preparation Programs: Equipping School Leaders for New Pressures and Challenges*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid.=1679.

instruction requirements, teachers must be able to differentiate instruction for students with disabilities, ELLs, and others. These staffing demands are immediate and constantly growing. For example, as public schools increasingly serve ELLs,[7] schools need more teachers trained in specific research-based ELL teaching strategies.[8] Schools have also observed growth in the percentage of students requiring special education[9] whose unique educational needs demand attention from school professionals well-trained in specific strategies for serving them. Accordingly, employing school teachers, administrators, and other personnel equipped to meet these growing challenges is one of the most important goals of our nation's schools.

2. Many schools face serious reductions in funding and resources.

While schools face increasing and changing demands in serving students and meeting performance benchmarks, they must do so against a

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[7] *See generally* Christopher B. Swanson, PERSPECTIVES ON A POPULATION: ENGLISH-LANGUAGE LEARNERS IN AMERICAN SCHOOLS 3 (2009), *available at* http://www.edweek.org/products/qc/pop/qc09-pop.pdf. English Language Learners bring many benefits to the classroom but also commonly have unique educational needs.

[8] *See id.*

[9] The percentage of public school students qualified for special education services grew from 8% in 1976-77 to nearly 14% in 2004-05. United States Department of Education Institute of Education Sciences, Digest of Education Statistics, Table 49 (2007), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_049.asp.

backdrop of diminishing resources and soaring costs. Many public school districts currently face reduced budgets and will likely continue to face reduced budget in the near future that will force substantial cuts in school expenditures.[10] At the same time, many districts struggle with higher fuel or food prices, or increasing insurance costs.[11]

These budget challenges are due to several influences, including the collapse of the nation's housing market, that have led to decreased property values. This crisis directly affects many districts that draw their primary financial support from local property taxes. Several states have also announced budget cuts for school funding.[12] This financial strain is exacerbated by soaring enrollment figures in some districts[13] and plunging enrollment in others.[14] Reductions in enrollment cause reductions

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[10] For example, the Miami-Dade County Public Schools and the Detroit County Public Schools face reduced budgets for the 2008-09 school year. Angela Pascopella, *A Perfect Storm: Annual School Spending Report*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid=1673.

[11] *See* Pascopella, *supra* note 10. *See also* Christopher Hann, *The Superintendents Speak*, DISTRICT ADMINISTRATION, Sept. 2008, *available at* www.districtadministration.com/viewarticlepf.aspx?articleid.=1674.

[12] *Id.* In California, for example, Governor Schwarzenegger has proposed cutting state education funding by $ 2.5 billion. *See* Leslie Postal & Aaron Deslatte, *Crist Warns of Possibility of More School Budget Cuts*, ORLANDO SENTINEL, Feb. 12, 2009, *available at* http://www.orlandosentinel.com/news/education/orl-morecuts1209feb12,0,2029514.story; EDUCATION COMMISSION OF THE STATES, ECS STATE NOTES ON STATE BUDGET SHORTFALLS: EXAMPLES OF STATE RESPONSES, Feb. 2009, *available at* www.ecs.org.

[13] Pascopella, *supra* note 10.

[14] *Id.*; Amanda Ripley, *Rhee Tackles Classroom Challenges*, TIME, Nov. 26, 2008 (observing that if students continue to leave the Washington,

in state funding, and those losses can be disastrous where a district must continue to pay fixed costs, such as building and ground maintenance, employee payroll and health insurance, and other expenditures not paid on a per-student basis.[15]

Financial woes have required many districts to consider staffing reductions, as a school's greatest expense is often personnel.[16] Accordingly, schools increasingly require teachers who not only provide cutting edge instruction, such as data-driven education of ELLs and students with disabilities, but also whose salaries fit reasonably within the ever-shrinking budget of the public schools.

D.C. schools at their current rate, "enrollment will drop 50% every ten years").

[15] Pascopella, *supra* note 10.

[16] *Id.* A potential $1.4 billion shortfall facing the New York City Public Schools may require a layoff of 15,000 teachers in 2009-10. Elissa Gootman, *Klein Implores Legislators to Reduce Cuts to Schools*, NEW YORK TIMES, Jan. 29, 2009, *available at* www.nytimes.com/2009/01/29klein.html. Additionally, state budget cuts and other financial woes may lead to layoffs in other states. *See* Berny Morson, *Math Problem for Schools: Get by with $125 Million Less*, ROCKY MOUNTAIN NEWS, Jan. 27-28, 2009, *available at* www.rockymountainnews.com/news/2009/jan/27/budget-ax-will-hit-schools/; Associated Press, *Largest N.C. School System May Cut 1200 Jobs*, NEWS & RECORD, Feb. 13, 2009, *available at* http://www.news-record.com/content/2009/02/13/article/largest_nc_school_system_may_cut_1200_job.

B. To Do More With Less, Schools Must Make Policy-Based Decisions That Lack Discriminatory Motive But Statistically May Favor Individuals Under 40.

1. Schools' decisions to hire recently-trained teachers and administrators are based on educational judgments.

The nature of student demographics and the role of public education in preparing students for the workforce are continually changing and so must the skills teachers need to meet these challenges. Because teacher preparation programs are responsive to these changes and arm future educators with cutting edge skills, school employers may make employment decisions favoring recently-trained educators or educators who have kept their skills current.

Because recently-trained educators are statistically more likely to be under 40, a preference for them may adversely affect older educators, but this preference is driven by legitimate educational interests, not discriminatory motives.[17] Thus, an

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[17] NATIONAL CENTER FOR EDUCATION STATISTICS, SPECIAL ANALYSIS 2005: MOBILITY IN THE TEACHER WORKFORCE (2005), *available at* http://nces.ed.gov/programs/coe/2005/analysis/index.asp (noting average age of new teachers in 1999-2000 was 29); C. EMILY FEISTRITZER, THE MAKING OF A TEACHER: A REPORT ON TEACHER PREPARATION IN THE UNITED STATES (1999), *available at* http://www.ncei.com/MakingTeacher-rpt.htm (noting average age of students preparing to teach at the undergraduate level is 22).

ADEA plaintiff who complains of a younger, more recently-trained colleague being given a promotion or who demonstrates a mere statistical preference for recently-trained teachers should not be permitted to shift the burden of persuasion to a defendant school employer. Rather, as conventional standards of proof dictate, the employee must prove an adverse employment decision was made *because of* age.

Deviating from the conventional burden allocation standards in ADEA cases will deter school employers from making employment decisions that, while educationally-based, result in an unintended age disparity. Moreover, even if this Court determines it is appropriate to shift the burden of persuasion in mixed-motive cases, this Court should preserve Justice O'Connor's *Price Waterhouse* standard, which requires direct evidence of a decision-maker's reliance on illegitimate criteria. Adopting the Petitioner's recommended allocation of burdens will increase schools' vulnerability to unfounded age discrimination claims and will ultimately discourage schools from seeking recently-trained educators.

a. Teachers who have recently completed teacher preparation programs are often better trained to teach English Language Learners.

In recent years, the population of English Language Learners in public schools has increased

substantially.[18] The challenge of providing effective instruction to ELLs is not new, but has been made more urgent by NCLB requirements that demand improvements in the performance of this student subgroup on assessments and statistics showing a disparity between the performance of English Language Learners and non-English Language Learners.[19]

To meet these challenges, teacher preparation programs have begun to offer ELL teacher certification that comprehensively trains teachers in the most innovative methods and strategies for teaching these students.[20] In light of the specialized

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[18] JEANNE BATALOVA, MICHAEL FIX, & JULIE MURRAY, MEASURES OF CHANGE: THE DEMOGRAPHY AND LITERACY OF ADOLESCENT ENGLISH LEARNERS – A REPORT TO CARNEGIE CORPORATION OF NEW YORK 23 (2007), *available at* http://www.carnegie.org/literacy/pdf/Measures_of_Change.pdf (estimating ELLs comprise approximately 10.5% of the total school age population); Tracy Gray & Steve Fleischman, *Research Matters: Successful Strategies for English Language Learners*, 62 EDUCATIONAL LEADERSHIP, 84-85 (Dec. 2004/Jan. 2005), *available at* http://www.ascd.org/publications/educational_leadership/dec04/vol62/num04/Successful_Strategies_for_English_Language_Learners.aspx (projecting ELLs will comprise 50 percent of the student population by 2015).

[19] *See* BATALOVA, *supra* note 18 at 40 (noting that only four percent of 8th grade ELL students scored proficient (or above) in reading on the National Assessment of Educational Progress (NAEP) test compared with 30% of non-English Language Learners).

[20] *See, e.g.*, Eamonn O'Donovan, *Staff Development for Teachers of English Language Learners: Project GLAD Encourages Teachers in a Comprehensive Model*, DISTRICT ADMINISTRATION, Nov. 2008, *available at* http://www.districtadministration.com/viewarticle.aspx?articleid=1749 (discussing effectiveness of project-based learning in working with ELLs); ASTA SVEDKAUSKAITE, CRITICAL ISSUE: USING TECHNOLOGY TO

skills needed to work with ELLs, school districts must employ teachers well-equipped to meet these challenges. Many of these teachers will be recently trained and under the age of 40. The correlation between age and recent training should not deter school districts from making employment decisions that simply prefer teachers who have received a specific amount and kind of training.

b. Recently-trained teachers are prepared to teach technology and Twenty-First Century Skills.

Today's employers expect schools to equip students with the skills needed in a global workplace, including critical thinking, analytical, communication, and technological skill [21] Responding to this demand, policy-makers have taken steps to ensure students receive instruction in these skills.[22] In turn, teacher preparation programs

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SUPPORT LIMITED-ENGLISH-PROFICIENT (LEP) STUDENTS' LEARNING EXPERIENCES, NORTH CENTRAL REGIONAL EDUCATIONAL LABORATORY (2003), *available at* http://www.ncrel.org/sdrs/areas/issues/methods/technlgy/te900.htm (discussing use of technology to teach ELLs).

[21] *See* PARTNERSHIP FOR 21ST CENTURY SKILLS, 21ST CENTURY SKILLS, EDUCATION, AND COMPETITIVENESS: A RESOURCE AND POLICY GUIDE 10 (2008), *available at* http://www.21stcenturyskills.org/documents/21st_century_skills_education_and_competitiveness_guide.pdf.

[22] For instance, NCLB sets out expectations for improving technology literacy among students and for ensuring technology is integrated into the curricula of all schools. 20

provide training in methodologies effective in imparting Twenty-First Century skills and in integrating technology into the classroom.[23]

Because most teacher preparation programs require coursework in instructional or educational technology, [24] recently-trained teachers are well-prepared to promote technology literacy and to teach Twenty-First Century skills. To prepare students to

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U.S.C. § 6752. Some states have content standards specifically requiring instruction on Twenty-First Century Skills. *See, e.g.*, West Virginia Department of Education, Teach 21 Home, http://wvde.state.wv.us/teach21/. Other states have developed technology proficiency standards for teachers. *See, e.g.*, South Carolina Department of Education, Teacher Technology Proficiency (Proviso 1.25), http://ed.sc.gov/agency/offices/tech/teachprofprov/index.html; Virginia Technology Standards for Instructional Personnel, 8 VA. ADMIN. CODE § 20-25-10 *et seq.*, *available at* http://www.doe.virginia.gov/VDOE/Compliance/TeacherED/tech.html; IDAHO CODE ANN. § 33-1213.

[23] *See* Bob Pearlman, *New Skills for a New Century: Students Thrive on Cooperation and Problem-Solving*, EDUTOPIA, http://www.edutopia.org/new-skills-new-century; Stephen Sawchuk, *21st Century Skills Focus Shifts W. Va. Teachers' Role*, EDUCATION WEEK, Jan. 5, 2009, *available at* http://www.edweek.org/ew/articles/2009/01/07/16skills_ep.h28.html; Colleen Brondou, *Project-Based Education Prepares Students for 21st Century Challenges*, Sept. 3, 2008, http://www.findingdulcinea.com/news/education/september-08/Project-Based-Education-Prepares-Students-for-21st-Century-Challenges-.html.

[24] Steven B. Smith, *Technology 101: Integration Beyond a Technology Foundations Course*, 16 J. OF SPECIAL EDUC. TECH. 43-45 (Winter 2001), *available at* http://jset.unlv.edu/16.1T/tasseds/smith.html; L. Whetstone & A.A. Carr-Chellman, *Preparing Preservice Teachers to Use Technology: Survey Results*, 45 TECHTRENDS 11-17 (July/Aug. 2001).

compete in a global workplace, school districts must be able to hire and place the individuals who they believe are best qualified to teach these skills, regardless of seniority or a perceived adverse impact on older workers. Upholding conventional standards of proof, in which plaintiffs must show an adverse action was taken "because of" age, best supports school employers in making these educationally-based, non-discriminatory employment decisions.

c. Recently-trained educators are equipped with the skills needed to teach special education students.

Over the past 30 years, the number of public school students identified as having a disability has nearly doubled.[25] During this same period, the responsibilities placed on public schools to educate students with disabilities have grown and transformed.[26] Eligible children with disabilities are

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[25] NATIONAL CENTER FOR EDUCATION STATISTICS, FAST FACTS: CHILDREN 3 TO 21 YEARS OLD SERVED IN FEDERALLY SUPPORTED PROGRAMS FOR THE DISABLED, BY TYPE OF DISABILITY: SELECTED YEARS, 1976-77 THROUGH 2003-04 (2006), *available at* http://nces.ed.gov/fastfacts/display.asp?id=64 (approximately 3,694,000 children with disabilities were served in federally supported educational programs in 1976; by 2003 that number had increased to 6,634,000 children).

[26] Under NCLB, schools are evaluated based on the achievement of students with disabilities on standardized exams. Additionally, IDEA requires public schools to provide each eligible child with a disability an individualized education program and related services. *See* 20 U.S.C. §§ 1401(3)(A), 1414(d).

guaranteed an individualized education, which must occur to the maximum extent appropriate with the child's nondisabled peers. *Id.* § 1412(A)(5). Thus, teachers in "general education" classrooms increasingly must ably educate students with disabilities alongside their non-disabled peers. This means teachers must differentiate instruction to meet the needs of students with disabilities (including multiple students with disabilities in the same classroom) as well as their nondisabled peers. This requires all teachers—not just special education teachers—to be prepared for such a challenge.

Additionally, the field of special education is rapidly developing. For example, recent changes to IDEA modified the way schools determine whether a child has a learning disability to reflect a growing body of research showing "Response to Intervention," or RTI to be effective in diagnosing specific learning disabilities.[27] To educate each child with a disability under IDEA and to improve academic achievement of students with disabilities under NCLB, schools must employ special education teachers recently trained in the latest pedagogical innovations and general education teachers who can differentiate instruction. As the field of special education research grows, the best trained individuals often will be those recently trained.[28] To

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[27] U.S. DEPARTMENT OF EDUCATION, Q & A: QUESTIONS AND ANSWERS ON RESPONSE TO INTERVENTION (RTI) AND EARLY INTERVENTION SERVICES (EIS) (Jan. 2007), *available at* http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C8%2C.

[28] Courses in instructing students with disabilities in general education classrooms are now staples of teacher preparation programs. *See, e.g.*, Indiana University, School of Education, Secondary Education English Language Arts Course

educate students with disabilities, schools must be free to hire those best trained to meet their needs without fear of increasing vulnerability to unfounded employment litigation.

d. Recently-trained teachers are likely to be trained to work with at-risk populations.

Public school districts are experiencing other demographic shifts, including staggering growth in the number of students living in poverty [29] and increases in student mobility, that have had a deep impact on student learning. [30] These student

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Requirements, http://education.indiana.edu/Portals/204/Language_Arts_January_2009.pdf (requiring "Teaching Students with Special Needs"); New York University Steinhardt School of Education, http://steinhardt.nyu.edu/teachlearn.olde/pdfs/English.pdf (requiring "Educating Students with Disabilities in General Education Classrooms").

[29] *See* Steve Suitts, *Crisis of the New Majority: Low-Income Students in the South's Public Schools*, SOUTHERN SPACES, Apr. 16, 2008, at 1, *available at* http://www.southernspaces.org/contents/2008/suitts/1a.htm (noting during the 2006-07 school year, 54% of the public school enrollment in Southern states were students from low income households); Press Release, Indiana Youth Institute, Increase in Indiana Child Poverty Nearly Doubles the U.S. Average (July 25, 2007), *available at* http://www.kidscount.org/datacenter/db_07pdf/pressreleases/IndianaPressRelease.pdf (noting 17% of Indiana children living in poverty in 2005).

[30] *See* Russell W. Rumberger, Student Mobility – The Extent of Student Mobility, The Impact of Mobility on Students, and the Causes of Mobility, http://education.stateuniversity.com/pages/2461/Student-Mobility.html (noting in Chicago public

populations present special challenges for teachers, especially in ensuring that these students do not drop out.[31]

Many schools of education have recently developed courses that provide intense training in teaching at-risk students.[32] Given the high stakes of educating at-risk students, school districts must be permitted to select and place the teachers whose training and experience best prepare them to serve these students. Because teachers who have recently completed teacher preparation programs are often given special training to help serve these populations, school districts with significant at-risk populations have legitimate non-discriminatory reasons for preferring these teacher candidates. Allowing an ADEA plaintiff employee who is adversely affected by this preference to shift the burden of persuasion on the issue of causation to the school employer fails to strike the balance sought by anti-discrimination legislation because it allows the plaintiff to use a simple correlation between age and recent training to create a burden-shifting inference of discrimination. This will force schools to over compensate for this correlation by hesitating to

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schools only 47% of the students remained in the same school over a four-year period).

[31] *Id.*

[32] *See, e.g.*, Duke University, Program in Education, http://www.duke.edu/web/education/courses/courselistings.html (offering course in "Motivation and At-Risk Students"); NATIONAL PARTNERSHIP FOR TEACHING IN AT-RISK SCHOOLS, QUALIFIED TEACHERS FOR AT-RISK SCHOOLS: A NATIONAL IMPERATIVE (2005), *available at* http://www.ecs.org/clearinghouse/57/96/5796.pdf (calling for research to help identify practices to place qualified staff in at-risk schools).

employ recently-trained educators despite desperately needing their skills to work with at-risk student populations.

2. Schools may more efficiently meet the requirements of NCLB by employing recently-trained teachers.

NCLB requires school districts to recruit and retain "highly qualified" teachers in all core academic subjects. 20 U.S.C § 6319(a)(2)(A) (2009). To meet the "highly qualified" requirement, a teacher must have a bachelor's degree, be fully licensed or certified, and demonstrate substantive competency in the subject taught. Teachers may demonstrate substantive competency by earning a major in the subject taught (or credits equivalent to a major), passing a state developed test, earning a graduate degree, or obtaining advanced certification in the subject taught. Because teachers who have recently completed teacher preparation programs will generally be deemed "highly qualified," school employers have legitimate educational reasons for preferring these teacher candidates [33] who have

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[33] NANCY FARNAN & DANA L. GRISHAM, LITERACY TEACHER PREPARATION: TEN TRUTHS TEACHER EDUCATORS NEED TO KNOW 102-113 (Susan D. Lenski, Dana L. Grisham, & Linda S. Wold, eds., 2005), *available at* http://www.reading.org/Library/OldRetrieve.cfm?bk588-10-farnan.pdf&D=10.1598/0872075885.10&F=bk588-10-Farnan.pdf (discussing continuum of teacher development and characterizing recently-trained teachers as "highly trained novices").

acquired competence both in content knowledge and instructional methodologies necessary to effective teaching.[34] School employers must be free to make these decisions without increasing their vulnerability to ADEA lawsuits.

3. Recently-trained administrators are equipped with the skills necessary to lead today's schools.

Like teachers, public school administrators face evolving challenges, so school districts' expectations for administrators today are very different than they were in the past. [35] Administrators are now expected to be instructional leaders, [36] as well as organizers, mobilizers, and

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[34] *See, e.g.*, Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequalities in California's Public Schools*, 43 SANTA CLARA L. REV. 1045, 1054-55 (2003)(explaining teachers must "understand the content their students are expected to learn, but also have a repertoire of teaching strategies to engender and support student understanding").

[35] *See generally*, INSTITUTE FOR EDUCATIONAL LEADERSHIP, LEADERSHIP FOR STUDENT LEARNING: REINVENTING THE PRINCIPALSHIP, SCHOOL LEADERSHIP FOR THE 21ST CENTURY INITIATIVE, A REPORT OF THE TASK FORCE ON THE PRINCIPALSHIP, Oct. 2000, *available at* http://www.iel.org/programs/21st/reports/principal.pdf (explaining how landscape has changed for school leaders and identifying reinvention strategies).

[36] *See generally* CHRISTOPHER MAZZEO, ISSUE BRIEF FOR THE NATIONAL GOVERNORS ASSOCIATION CENTER FOR BEST PRACTICES: IMPROVING TEACHING AND LEARNING BY IMPROVING SCHOOL LEADERSHIP, Sept. 12, 2003, http://www.nga.org/cda/

collaborative role models. Principal leadership programs are responding to these changes and are identifying innovative ways to train new administrators. Like employment decisions that favor recently-trained teachers, employment decisions that favor recently-trained administrators may adversely affect older workers. Because shifting the burden of proof to the employer will make it easier for plaintiffs to prevail in ADEA lawsuits, schools may seek to avoid such lawsuits by refraining from seeking recently-trained school leaders. This response undermines school employers' rights to make decisions lacking discriminatory motive and impedes school districts from accomplishing their goals.

4. School districts must be able to enact employment policies that put the right people in the right positions and cut down on salary expenditures.

School employment policies are traditionally seniority-driven.[37] But given the challenges facing

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files/091203LEADERSHIP.pdf (describing principal as organizer, entrepreneur, and instructional leader).

[37] *See, e.g.*, Collective Negotiations Contract between the Board of Education San Diego Unified School District and the San Diego Education Association (July 1, 2006 – June 30, 2008), at 50-51, 96, *available at* http://www.nctq.org.contracts/13.pdf (specifying layoffs by reverse seniority and establishing seniority as a factor in intra-district transfers); Agreement between the Board of Education of the City of Chicago and the Chicago Teachers Union, Local No. 1, American Federation of Teachers, AFL-CIO (July 1, 2007 – June 30, 2012), at 24, 31-32,

districts today, years of experience should not be the sole measure of an individual's performance as a teacher or administrator. A school district's workforce must be rich with individuals who possess the skills needed to effect change. Likewise, the school district must also be able to afford the workforce it employs. Building that workforce may require districts to set aside seniority rules and implement non-traditional staffing measures that may favor less-experienced, younger educators.

a. School districts must be able to use reductions-in-force to retain a work force that meet their needs.

Salary and benefit expenditures comprise most of a district's budget.[38] Thus, when districts are forced to make budget adjustments, cuts are typically made in salary expenditures, often through reductions-in-force (RIFs) that provide immediate financial relief. Many districts across the country have recently conducted RIFs due to shrinking

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41-42, *available at* http://www.nctq.org/contracts/4.pdf (giving preference to certain positions based on seniority and specifying layoffs and reappointments are based on seniority).

[38] *See generally* U.S. Department of Education, National Center for Education Statistics, Table 165: Summary of Expenditures for Public Elementary and Secondary Education, by Purpose: Selected Years, 1919-20 through 2004-05, *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_165.asp (noting in 2004-05, instruction costs were 52%, administration costs were 6.5%, and other school services were 18.3% of total expenditures).

budgets.[39] School districts may also use RIFs to mitigate fluctuations in student enrollment due to changes in student preferences, changes in the district's educational goals, or changes brought about by external demands, like NCLB.[40] For instance, because NCLB requires districts demonstrate progress in specific academic areas, many districts have increased instructional time in language arts and math, and reduced the amount of time for elective courses.[41] These curricular shifts

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[39] *See, e.g.*, Jason Song & Howard Blume, *LA Unified May Lay Off Almost 2,300 Teachers, Officials Say*, LOS ANGELES TIMES, Jan. 7, 2009, at 1, *available at* http://www.latimes.com/news/education/la-me-layoffs7-2009jan07,0,3675869.story; Nina Sears, *Dallas School District Fires 375 Teachers*, NEA TODAY, Oct. 24, 2008, at 1, *available at* http://blogs.nea.org/ednotes/2008/10/dallas-school-district-fires-375.html; The Associated Press, *Largest N.C. School System May Cut 1,200 Jobs*, NEWS-RECORD.COM, Feb. 13, 2009, *available at* http://www.news-record.com/content/2009/02/13/article/largest_nc_school_system_may_cut_1200_jobs.

[40] For instance, when a district experiences a particularly large influx of students at one particular level, it may need to hire additional staff. As those students move through the system and enrollment numbers return to pre-influx levels, the district may need to hire staff in the upper grades and reduce staff in the grades where the influx originally necessitated hiring. When this occurs, districts may be simultaneously hiring and RIFing employees.

[41] *See generally* JENNIFER MCMURRER, CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA, CENTER ON EDUCATION POLICY REPORT FROM THE SERIES FROM THE CAPITAL TO THE CLASSROOM: YEAR 5 OF THE NO CHILD LEFT BEHIND ACT, Dec. 2007, *available at* http://www.cep-dc.org/ data/n_0001/resources/live/07107%20Curriculum-WEB%20FINAL%207%2031%2007.pdf (62% of districts reported increased instructional time for English language arts since the inception of NCLB and approximately 44% reported

may prompt school districts to eliminate underutilized positions.

In states that require collective bargaining, unions typically negotiate contracts insulating senior employees from dismissal in a RIF, such as through "last hired, first fired" provisions requiring districts to RIF newly-hired employees first.[42] However, nearly one-third of all states do not require collective bargaining.[43] In these states, school districts may decide to eliminate positions based upon educational judgments, not seniority rules.

When districts are free to make decisions driven purely by educational and business goals, a RIF may disproportionately affect a district's more experienced employees. First, eliminating the positions with the highest salaries is fiscally prudent. Because most school districts' salary structures reward employees with the highest levels of education and the longest tenure, the employees with the highest salaries are likely to be over 40.

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cutting time from subjects such as social studies, science, art and music, and physical education).

[42] *See, e.g.*, Collective Bargaining Agreement between the Seattle Public Schools and Seattle Education Association Certificated Non-Supervisory Employees (2004-2009), at 112-13, *available at* http://www.nctq.org/contracts/61.pdf; Teachers Employment Agreement between the United Teachers of Wichita and the USD 259 Board of Education (2008-2009), at 34, *available at* http://www.nctq.org/contracts/101-07.pdf.

[43] For instance, Texas, Georgia, South Carolina, North Carolina, and Virginia prohibit collective bargaining. Collective bargaining is permissible, but not required, in Arizona, Utah, Colorado, Wyoming, Louisiana, Mississippi, Arkansas, Missouri, Kentucky, Alabama, and West Virginia. *See* National Council on Teacher Quality, District Map, http://www.nctq.org/tr3/search.jsp .

Second, districts are able to preserve a larger overall number of positions by eliminating the positions with the highest salaries.[44] Given booming student enrollment, challenging student populations, and external demands for accountability, good educational judgment may demand the preservation of as many positions as possible. Such a policy would have the effect of favoring less experienced, younger employees. Third, as discussed above, recently-trained teachers and administrators are likely to be "highly qualified" under NCLB, credentialed to teach English Language Learners, and skilled in integrating technology into the classroom. [45] School districts, thus, have educationally-based reasons for preserving positions held by teachers with these skills, who are often those recently-trained.

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[44] *See generally* Stephen Sawchuk, *Layoff Policies Could Diminish Teacher Reform*, EDUCATION WEEK, Feb. 23, 2009, at 1, *available at* http://www.edweek.org//ew/articles/2009/02/25/22purge-2.h28.html?tkn=VOVFQkmMPmFAz9MFkBfoEnOoE0ZaP0RjEBmw&print=1 (noting "last hired, first fired" policies, in which teachers with lower salaries are dismissed first, "necessitate the cutting of more teachers than seniority-neutral layoff policies, hurting both teachers and students in the process").

[45] For instance, under the Los Angeles Unified School District collective bargaining agreement, teachers trained in high-need subject areas are exempt from layoffs. Agreement between Los Angeles Unified School District and United Teachers Los Angeles (2006-2009), at 146, *available at* http://www.nctq.org/contracts/3.pdf. However, it is unclear whether this provision offers a similar exemption for teachers who are certified to teach English Language Learners. *See* Sawchuk, *supra* note 44, at 1.

Districts must be free to retain the teachers best-suited to help them achieve their goals. Allowing an employee to use the correlation between age and these educationally-based goals to shift the burden of persuasion to school employers in ADEA lawsuits treats this correlation as if it were based on animus and imposes an onerous burden on districts simply seeking to maintain well-staffed schools and to make necessary budget cuts.

b. School districts must be able to reorganize and to reassign staff in ways that accomplish educational goals.

Studies consistently show that the greatest determinant of student achievement is teacher quality.[46] Thus, a district's capacity to raise student achievement is tied to its ability to make employment decisions about its instructional staff.

In recent years, several urban school districts have undergone large scale reorganizations,[47] some

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[46] *See generally* Linda Darling Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUCATION POLICY ANALYSIS ARCHIVES, Jan. 2000, *available at* http://epaa.asu.edu/epaa/v8n1/; Steven G. Rivkin, Eric A. Hanuhek, & John F. Kain, *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA, 417-58 (2005), *available at* http://edpro.stanford.edu/Hanushek/admin/pages/files/uploads/teachers.econometrica.pdf.

[47] *See generally* Karla Scoon Reed, *Mayor Outlines Major Overhaul of N.Y.C. System*, EDUCATION WEEK, Jan. 22, 2003, *available at* http://www.edweek.org/ew/articles/2003/01/22/19nyc.h22.html?qs=joel_klein+administrative (describing plans to reorganize New York City schools by building a new

spurred by No Child Left Behind's accountability standards and schedule of corrective action. Under NCLB, districts that fail to demonstrate adequate yearly progress for five consecutive years must develop a "restructuring plan" to improve student learning.[48] This plan may include, among other measures, replacing school personnel "relevant" to the failure to demonstrate progress. When replacing staff, school districts must hire teachers who have the training, skills, and talent to accomplish significant gains in student achievement. As discussed above, recently-trained teachers are well-versed not only in instructional strategies that facilitate acquisition of essential skills in the core content areas but also in instructional strategies that facilitate mastery of the skills policy-makers and business leaders expect of students. Given the likely depth of recently-trained teachers' skills and the immediacy of school districts' imperatives to demonstrate improvement, school employers may be prudent to select recently-trained teachers to fill vacant positions. Hiring practices that favor recently-trained teachers may statistically favor younger teachers. If school employers are deterred from making educational judgments about the qualities needed in their workforce based on a fear of

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administrative framework, eliminate unnecessary positions, abolishing community school districts, and adopting a uniform curriculum).

[48] 20 U.S.C. § 6316(b)(7)-(8) (2009). *See also* THE CENTER FOR COMPREHENSIVE SCHOOL REFORM AND IMPROVEMENT, SCHOOL RESTRUCTURING UNDER NO CHILD LEFT BEHIND: WHAT WORKS WHEN? 35-59 (2006), *available at* http://www.centerforcsri.org/files/RestructuringGuide.pdf (identifying strategies for restructuring).

increased ADEA lawsuits, their efforts to improve student performance will be stymied.

In addition to making hiring decisions based on educational judgments about the teacher qualities needed to effect change, school districts must also assign and place teachers strategically within districts to elicit necessary student performance improvements. While recently-trained teachers broaden a district's collective knowledge of cutting edge instructional strategies, experienced teachers play a crucial role in mentoring new teachers and providing building-level leadership. This guidance is especially valuable in schools serving the lowest performing students. Paradoxically, in many districts, where job bidding rights are based on teacher seniority, experienced teachers commonly transfer out of those schools in favor of higher performing schools.[49]

Given the leadership potential of experienced teachers, many districts are seeking ways to transfer

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[49] Charles Clotfelter, Elizabeth Glennie, Helen Ladd, & Jacob Vigdor, *Would Higher Salaries Keep Teachers in High Poverty Schools? Evidence From a Policy Intervention in North Carolina*, 92 J. OF PUBLIC ECON. 1352-70 (Aug. 2007) ("Numerous studies have documented the tendency for the most qualified teachers to gravitate toward schools that serve relatively well-off children, even though salaries are often no higher in such schools."); Joe Smydo, *City District May Offer Bonuses to Attract Teacher to Lower-Performing Schools*, PITTSBURGH-POST GAZETTE, Nov. 6, 2008, *available at* http://www.post-gazette.com/pg/08311/925798-298.stm ("Under many collective bargaining agreements, the more seniority teachers have, the more influence they have over where they teach. Experienced and effective teachers often transfer away from troubled schools, forcing districts to assign newer faculty members to students needing a master's help.").

outstanding veteran teachers to the district's most challenging placements. [50] And where these outstanding veteran teachers are already teaching in a district's most challenging placements, districts are considering ways to retain them in these placements. [51] Policies that involve reassigning veteran teachers to challenging placements (or retaining veteran teachers in these placements) may statistically disfavor older workers due to correlation between years of service and age. These policies, however, are not based on age-based animus but rather are reflections of educational judgments of

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[50] For instance, some districts have incentive programs, discussed more fully in Section II. B. 4. c. below, to entice teachers to transfer to high-need schools and placements. Other districts are adopting policies requiring experienced teachers to transfer to these schools.

[51] Retaining teachers in these placements is often complicated by the fact that many school districts have negotiated seniority-based voluntary transfer policies. *See* JESSICA LEVIN, JENNIFER MULHERN & JOAN SCHUNCK, UNINTENDED CONSEQUENCES: THE CASE FOR REFORMING THE STAFFING RULES IN URBAN TEACHERS UNION CONTRACTS (2005), *available at* http://www.tntp.org/files/UnintendedConsequences.pdf. Under intra-district seniority-based voluntary transfer provisions, teachers with the most seniority are given preference when vacant positions in the district open. Thus, as vacancies arise, teachers with the most experience often transfer to the most desirable placements, typically with high-achieving students. *See* Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, 17 THE FUTURE OF CHILDREN 69, 75-76 (2007), *available at* http://www.futureofchildren.org/usr_doc/7_04.pdf; Eric A. Hanushek, John F. Kain, & Steven G. Rivkin, *Why Public Schools Lose Teachers*, J. OF HUM. RES. (Sept. 2003), *available at* http://edpro.stanford.edu/Hanushek/admin/pages/files/uploads/lose%20teachers.jhr.pdf.

student need.[52] School districts should not be deterred from making educationally-based decisions that may adversely affect older workers simply because of a correlation between age and years of service.

c. Incentive programs help school districts attract and retain the right staff.

To improve student achievement and to attract and retain talented teachers, school districts across the country have implemented incentive programs.[53] Because the traditional public school pay structure tends to reward longevity, and because the longest-tenured, most-educated teachers are not always the most effective,[54] many school districts

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[52] *See, e.g.*, Julie E. Koppich, *Using Well-Qualified Teachers Well: The Right Teachers in the Right Places with the Right Support Bring Success to Troubled New York City Schools*, AMERICAN EDUCATOR (Winter 2002), *available at* http://www.aft.org/pubs-reports/american_educator/winter2002/UsingTeachers.html.

[53] *See generally* Jacob Vigdor, *Scrap the Sacrosanct Salary Schedule: How About More Pay for New Teachers, Less Pay for Older Ones*, 8 EDUCATION NEXT 36-42 (Fall 2008), *available at* http://www.hoover.org/publications/ednext/27100089.html; JENNIFER AZORDEGAN, PATRICK BYRNETT, KELSEY CAMPBELL, JOSH GREENMAN & TRICIA COULTER, ISSUE PAPER: DIVERSIFYING TEACHER COMPENSATION (Dec. 2005), *available at* http://www.ecs.org/clearinghouse/65/83/6583.pdf (providing examples of various types of compensation systems).

[54] *See* Darling Hammond, *supra* note 46 (finding teachers' education levels are a weak predictor of student achievement); Dan Goldhaber & Emily Anthony, *Can Teacher Quality Be Effectively Assessed? National Board Certification as a Signal*

have instituted incentive programs to motivate teachers to pursue training related to district goals, to improve student achievement, or to teach in high-need subject areas or in high-need schools.

For instance, NCLB specifically authorized bonus funds for teachers who teach high-need subjects or in high-poverty areas. 20 U.S.C. § 6613(c)(12). Several states have similarly appropriated funds to attract teachers to high-need schools. [55] For many reasons, recently-trained teachers may be more likely to pursue these incentives. First, recently-trained teachers, many of whom are recent college graduates, are more likely to be persuaded by cash stipends. Second, recently-trained teachers have been trained to and expect to

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of Effective Teaching, 89 REV. ECON. & STAT. 134-50 (2007), *available at* http://www.mitpressjournals.org/doi/abs/10.1162/rest.89.1.134?cookieSet=1&journalCode=rest (casting doubt on whether NBPTS certification signals teacher quality).

[55] In 2005, the Alabama Legislature appropriated $725,000 for incentives to attract teachers to schools with a high percentage of students living in poverty. *See* EDUCATION COMMISSION OF THE STATES, ECS STATE NOTES ON INCENTIVE PAY/BONUS PROGRAMS, *available at* http://mb2.ecs.org/reports/Report.aspx?id=592. In 2003, the California legislature authorized the Teacher Recruitment Incentive Program, funded at more than $9 million, to provide incentives to teach in high-need schools. RONEETA GUHA, ASHLEY CAMPBELL, DANIEL HUMPHREY, PATRICK SHIELDS, JULIET TIFFANY-MORALES, & MARJORIE WECHSLER, TEACHING AND CALIFORNIA'S FUTURE: CALIFORNIA'S TEACHING FORCE 2006: KEY ISSUES AND TRENDS (2006), *available at* http://www.hewlett.org/NR/rdonlyres/527179A0-4837-4EC0-8F9D-486FD59DC7D9/0/TCF2006FINAL.pdf. Though short-lived due to budget constraints, the TRIP program was deemed a success. *Id.*

work with ELLs, special education students, and other at-risk populations and are thus often more willing to accept positions in high-need schools. Third, many states, districts, and administrators specifically seek new teachers [56] because, among other things, recently-trained teachers are more likely to share "the view that low-income children are capable of learning at a high level, if taught well."[57] While these incentive-based programs may statistically favor recently-trained—i.e., younger teachers—these programs are not motivated by any intent to discriminate on the basis of age. Rather, these programs aim to attract teachers to hard-to-staff schools and to develop faculty trained to work with at-risk students. Districts must remain free to adopt incentive-based programs, even if these programs are more attractive to younger workers. If plaintiff employees are permitted to rely on an age-based correlation (between receipt of incentives and

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[56] *See* Catherine Siskos, *B is for Bonus – Attracting New Teachers*, KIPLINGER'S PERSONAL FINANCE MAGAZINE, May 2001, *available at* http://findarticles.com/p/articles/i_m1318/is_5_55/ai_73828271 (describing Massachusetts program offering recent college graduates a $20,000 signing bonus to teach math, science, or foreign languages for four years in public schools); Greg Toppo, *Young, Inexperienced Teachers Recruited to New Orleans*, USA TODAY, Sept. 11, 2008, *available at* http://www.usatoday.com/news/education/2008-09-10-new-orleans-teachers_N.htm (noting average age of teachers in teachNOLA, an arm of the New Teacher Project, is 29.3).

[57] *See* Jay Matthews, *Extra-Credit: Are Older Teachers Too Jaded to Be Effective*, WASHINGTON POST, Feb. 19, 2009, *available at* http://voices.washingtonpost.com/class-struggle/2009/02/extra_credit_are_older_teacher.html.

recently-trained teachers) to shift the burden of persuasion in ADEA lawsuits, school employers are likely to be deterred from using incentives to develop the instructional workforce they need.

C. Shifting Burdens To Favor Plaintiffs In ADEA Employment Cases Will Hinder American Schools In Meeting The Demands Of The Twenty-First Century Where Statistical Disparities Arise.

As the job market worsens, employers will see a rising tide of employment litigation.[58] The costs of increased litigation place an onerous financial burden on school employers who are already forced to do more with less. As discussed above, some of the measures schools must take to meet the needs of public school students in the Twenty-First Century pose a risk of creating statistical disparities among employees based on age even when not motivated by discriminatory animus. Accordingly, school leaders will likely fear that taking these measures, even where necessary to support student gains, presents

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[58] As the unemployment rate rises, the pool of potential employment litigation plaintiffs rises as well. At the same time, a drop in the number of available positions exacerbates this effect. In a favorable economy, some laid off workers may be less likely to challenge the circumstances of their termination if they are able to readily find replacement work. The opposite is true when the job market wanes. Given this landscape, employers generally can expect increased employment litigation in response to the depressed job market. *See* John J. Donahue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STANFORD L. REV. 983 (May 1991).

too great a risk of employment litigation that would drain any funds saved by such measures. For example, a school board may think twice about hiring a teacher with a recent ELL certification, who is under 40, knowing that a possible disparate treatment plaintiff may cite the other younger, recent graduates the board has recently hired as evidence of the school board's discriminatory intent.

While the impact of this statistical evidence is significantly less weighty in disparate treatment cases, disparate treatment plaintiffs, like Petitioner in this case, frequently point to statistical disparities to support their discrimination claims. Statistical evidence is commonly consulted in the disparate treatment context. *See, e.g., Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1977) (racial mix of employer's work force is relevant to determining whether hiring decisions were motivated by race in disparate treatment action).[59] In fact, some courts have suggested that in the disparate treatment context, statistical evidence is relevant *even* where it is *not as methodologically sound* as is required in the disparate impact context. *See Bruno*, 882 F.2d at 766-67. Additionally, the Equal Employment

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[59] *See also Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1209 (10th Cir. 2002) (employer's practice regarding minority employment, including statistical data relevant to pretext inquiry in disparate treatment case); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 766-67 (3d Cir. 1989); *Casillas v. U.S. Navy*, 735 F.2d 338, 342 (9th Cir. 1984); *Minority Employees At Nasa (MEAN) v. Beggs*, 723 F.2d 958, 962 (D.C. Cir. 1983) ("It is well established that statistical data and comparative information concerning an employer's treatment of minorities is relevant evidence in an individual discrimination claim against that employer.").

Opportunity Commission views statistical information as relevant to a disparate treatment claim.[60] Accordingly, public school employers expect inquiries about workforce demographics relating to a particular decision even when facing individual charges of disparate treatment and thus consider demographics when making employment decisions. Undoubtedly, this consideration is, at least in part, a positive intended consequence of employment discrimination law. In practice, however, an unintended consequence will be that schools avoid decisions furthering important educational goals simply because they may lead to a statistical disparity that, while not motivated by discrimination, renders a district vulnerable to litigation imposing intolerable financial and productivity costs.

This hesitance is the kind of "inappropriate prophylactic" measure on which Justice O'Connor based her concurrence in *Price Waterhouse*, 490 U.S. at 274. A rule requiring ADEA plaintiffs to prove that age was the but-for cause of a challenged decision is truest to the plain language of the law, in

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[60] *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL: COMPENSATION DISCRIMINATION, USING STATISTICS § 10:3 (Dec. 5, 2000), *available at* http://www.eeoc.gov/policy/ docs/compensation.html ("statistics . . . can help determine whether an individual has suffered from intentional discrimination in compensation"); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL: RACE AND COLOR DISCRIMINATION, CONDUCTING A THOROUGH INVESTIGATION § 15:2 (Apr. 19, 2006), *available at* http://www.eeoc.gov/policy/docs/race-color.html ("Statistics reflecting the employer's general policy or practice can be helpful in determining whether race was a factor in a particular selection decision.").

line with conventional principles of civil litigation, and fairly preserves the balance between employer and employee rights. Even if the Court finds it necessary to shift the burden to defendants in some circumstances, however, requiring plaintiffs to provide direct evidence of discrimination before shifting the burden will better preserve that critical balance. As is demonstrated above, the failure to preserve this balance not only impacts employers, but also those they serve. For public schools, an imbalance of burdens favoring plaintiffs in employment litigation matters will be to the detriment of students.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

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